

ACCOUNTABILITY OF  
TOP MANAGEMENT

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LAWYERS WITH INTEGRITY





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# INTRODUCTION

## TOP MANAGEMENT

- There is no statutory definition
- A term used to designate persons performing the highest level of management of a company or organization, i.e., the group of managers holding the highest-ranking positions within the organization
- It includes the following persons:
  - › Members of the statutory body
  - › Members of the supervisory board, control and other corporate bodies
  - › Procurist
  - › Head of an organizational unit
  - › Senior executives (General Director, CEO, CFO, CIO, CTO, COO, CCO, etc.)
  - › Bankruptcy trustee
  - › Liquidator



## STATUTORY BODY

- The term **statutory body** designates a person or persons authorized to act on behalf of a legal entity and to perform legal acts **in its name**.
- For example, pursuant to Section 133(1) of the Commercial Code: “... *If there are several managing directors, each of them is authorized to act on behalf of the company individually ...*”
- Pursuant to Section 191(1) of the Commercial Code: “*The board of directors is the statutory body of the company which manages the company’s activities and acts on its behalf... The members of the board of directors who act on behalf of the company, and the manner in which they do so, are entered in the Commercial Register.*”
- **The following are not statutory bodies, but may act on behalf of a legal entity:**
  - › Procurist
  - › Bankruptcy trustee
  - › Liquidator
  - › Head of an organizational unit
  - › Other persons on the basis of a power of attorney

Unlike a statutory body, a **prokúra** is a special type of commercial authorization covering all legal acts arising in the course of the operation of a company, under which the procurist **acts on behalf of the company**. The procurist signs by adding to the business name of the company or other entrepreneur, **on whose behalf he acts**, a designation indicating the commercial power of attorney (prokúra) together with his signature.

**Authorized person, person at an establishment:** Persons entrusted with certain activities in the operation of a business are deemed representatives of the company. Such persons are authorized only for acts that usually occur in the course of operating the business (e.g., in a bank, the head of

the credit department may be authorized to sign loan agreements; in a retail shop, a salesperson concludes purchase agreements concerning the sale of goods in the shop).

**Head of an Organizational Unit:** If the head of an organizational unit is registered in the Commercial Register, he or she is authorized to act on behalf of the company only in matters concerning the organizational unit. This means that by virtue of such registration in the Commercial Register, a statutory authorization arises.

Form of Legal Entity	Executive Body
General Partnership (G.P.)	Each partner individually / Some of the partners / All partners jointly (§ 85 of the Commercial Code)
Limited Partnership (L.P.)	General partners / each acting individually or as otherwise specified in the partnership agreement (§ 101 of the Commercial Code)
Limited Liability Company (LLC)	Managing Director/ Managing Directors (§ 133 of the Commercial Code)
Joint Stock Company (JSC)	Board of Directors (§ 191 of the Commercial Code)
Simple Joint Stock Company (SJSC)	Board of Directors (§ 220zc of the Commercial Code)
Large Cooperative (50+ members)	Board of Directors [§ 243 (2) of the Commercial Code]]
Small Cooperative (≤50 members)	Chairperson / other member appointed by the members’ meeting [§ 245(2) of the Commercial Code]]

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European Company (SE)	One-tier management system – Board of Directors (§ 22 of Act No. 562/2004 Coll.) or two-tier management system – Management Board (§ 20 of Act No. 562/2004 Coll.)
European Cooperative Society (SCE)	Chief Executive Officer in a one-tier system – [§ 22 (1) of Act No. 91/2007 Coll.] or Management Board in a two-tier system – [§ 16 (1) of Act No. 91/2007 Coll.]
Foundation	Administrator of the foundation (§ 25 of Act No. 34/2002 Coll.)

The Commercial Code and other special legal regulations define who or which body is regarded as the statutory body depending on the type of legal entity, for example:

- Unless otherwise provided by the articles of association or statutes, any member of the statutory body may act on behalf of the company and perform a legal act.
- Composition of the statutory body:
  - › Individual – e.g., a managing director
  - › Collective – e.g., the board of directors in a joint-stock company (a.s., j.a.s.) or in a cooperative
- Types of representation:
  - › sole representation
  - › joint representation, e.g., two managing directors in an LLC (s.r.o.) jointly, or the chairman and a member of the board of directors in a joint-stock company (a.s.) jointly
- The manner of representation of the statutory body is recorded in the Commercial Register (this entry has declaratory effect).

- Failure to comply with the prescribed manner of representation may result in the invalidity of the legal act.

See the judgment of the Supreme Court of the Czech Republic, file no. 29 Cdo 655/00: *“From these findings of fact, which are adopted by the appellate court, it clearly follows that the purchase contract in question must be regarded as absolutely null and void, since the legal entity – the entrepreneur – did not act properly through its statutory body (Section 13(1), second sentence of the Commercial Code), as only one of the managing directors acted legally, although both managing directors were required to act jointly (Section 133(1) of the Commercial Code). The managing director(s) constitute(s) the statutory body with general authority, and his (their) acts are direct acts of the legal entity.”*

## CONTROL AND SUPERVISORY BODIES

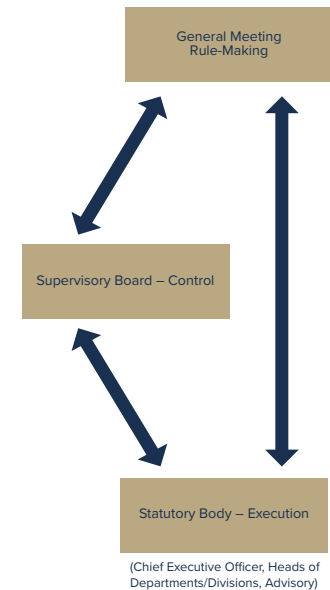
- They are established in capital companies (joint-stock companies, limited liability companies), but also in other entities if provided for by a special law or by the founding document (e.g., cooperatives, simple joint-stock companies, state enterprises, public research institutions, associations of legal entities, foundations, endowment funds, etc.).
- They are usually collective bodies.\*
- Their focus is on supervising the exercise of powers of the statutory body and the business activities of the company (e.g., they review financial statements and reports on business activities).
- Details concerning their composition, election, term of office, activities and rules of procedure are laid down in the deed of incorporation (memorandum of association), statutes, and other internal regulations.
- Membership in a control or supervisory body is incompatible with the position of a member of the statutory body,

liquidator, bankruptcy trustee, head of an organizational unit, procurist, etc.

- Members are subject to a non-compete obligation.

\*In the case of foundations, if no supervisory board is established, the powers of the supervisory board are exercised by an auditor.

## INTERNAL RELATIONS



## FUNCTION PERFORMANCE GENERAL

- The basic duties in the performance of a function (scope of duties) arise from:
  - › legal regulations
  - › the contract on the performance of function/mandate contract
  - › the articles of association / statutes
  - › decisions of the company's bodies (e.g., general meeting, members' meeting, board of trustees).

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Examples of the statutory functions of the roles in a joint-stock company in relation to the other corporate bodies:

STATUTORY BODY	SUPERVISORY BOARD
Company Management	Supervision of the performance of the powers of the Board of Directors and the conduct of the company's business activities.
Decision-making on all matters not reserved for the competence of the General Meeting or the Supervisory Board.	Inspection of all documents and records relating to the company's activities.
Preparation of documents for the General Meeting.	Verification that accounting records are properly maintained in accordance with reality and that the company's business activities are conducted in compliance with legal regulations, the Articles of Association, and resolutions of the General Meeting.
Ensuring proper bookkeeping/accounting of the company.	Convening a General Meeting when required by the interests of the company and proposing necessary measures to the General Meeting.
Submission of the annual report to the General Meeting and filing it in the collection of documents.	Informing the General Meeting of the results of its supervisory activities.
Preparation and filing of the consolidated financial statements and the consolidated annual report of the company in the collection of documents, if the company has such an obligation.	Reviewing the financial statements that the company is required to prepare under special legislation, as well as the proposal for the distribution of profits or the coverage of losses, and submitting its opinion to the General Meeting.
The General Meeting submits for approval the regular individual financial statements and the extraordinary individual financial statements, which the company is obliged to prepare according to a special regulation, and sends these statements to shareholders holding registered shares at least 30 days before the date of the General Meeting that will consider their approval. If the company has issued bearer shares, the main data of these financial statements shall be published within the same period in the manner prescribed by law and specified in the articles of association for convening the General Meeting.	Granting consent to the provision of loans or credits, to the transfer or use of the company's assets, or to the securing of an obligation in favor of a member of the Board of Directors, a procurist, or any other person authorized to act on behalf of the company, as well as to persons close to them or persons acting on their behalf.
Submitting a proposal for the distribution of profit or coverage of losses in accordance with the articles of association to the General Meeting.	Enforcement of the company's claims for damages and other claims against members of the Board of Directors.
Providing the financial statements to shareholders for inspection at the company's registered office.	
Submitting to the General Meeting for discussion a report on the company's business activities and the state of its assets within the deadlines set by the Articles of Association, otherwise once a year as part of the annual report.	
Submitting written information to the Supervisory Board on the company's principal business management objectives for the forthcoming period and on the anticipated development of the company's assets, finances, and earnings.	
Submitting to the Supervisory Board, upon its request and within the deadlines determined by it, a written report on the state of the company's business activities and assets compared with the anticipated development.	
Immediately informing the Supervisory Board of all facts that may materially affect the development of the company's business activities and the state of its assets, in particular its liquidity.	
Attending the meetings of the Supervisory Board upon its request and providing supplementary information concerning the submitted documents.	
Convening an extraordinary General Meeting if it is found or can be reasonably expected that the company's loss exceeds one-third of the registered capital, and submitting proposals for remedial measures to the General Meeting, while informing the Supervisory Board of such facts.	

*Note: The statutory scope of duties of members of the statutory and supervisory bodies of a simple joint-stock company, a cooperative, and a European company is, in principle, similar to that applicable to a joint-stock company.*

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### Examples of the statutory functions of roles in a limited liability company:

STATUTORY BODY	SUPERVISORY BOARD
Business management – internal conduct. Performing duties with professional due care.	Supervising the activities of managing directors. Inspecting the company's business and accounting books and other documents.
Ensuring the proper maintenance of prescribed accounting records.	Reviewing the regular, extraordinary, consolidated, or interim financial statements and the proposal for the distribution of profits or coverage of losses, and submitting its opinions to the General Meeting.
Maintaining the list of shareholders (or partners).	Submitting reports to the General Meeting within the period specified in the Articles of Association, otherwise once a year.
Informing the shareholders about matters concerning the company.	Requesting information and explanations from the managing directors on all matters relating to the company.
Submitting regular and extraordinary financial statements to the General Meeting for approval.	Filing an action for a declaration of invalidity of a General Meeting resolution.
Submitting an application for registration of changes or deletion of entries in the Commercial Register.	Representing the company in proceedings concerning the invalidity of a General Meeting resolution if the applicants are managing directors.
Filing documents prescribed by law in the Collection of Deeds maintained by the Register Court.	Submitting draft resolutions to shareholders for per rollam (written) decision-making.
Ensuring compliance with the conditions for the payment of profit shares under Section 123(2) of the Commercial Code.	Attending the General Meeting.
Convening the General Meeting at least once a year.	Convening the General Meeting whenever required in the interests of the company.
Preparing a consolidated version of the Articles of Association (or Deed of Incorporation) in the event of any amendments.	
Notifying shareholders of the results of the per rollam voting after the decision has been adopted.	
Submitting information on the company's key business management objectives for the forthcoming period and on the anticipated development of the company's assets, finances, and revenues to the Supervisory Board or to the General Meeting (if no Supervisory Board has been established).	
Submitting a written report on the company's business activities and assets compared to the anticipated development upon request and within the period determined by the Supervisory Board or the General Meeting.	
Immediately informing about all circumstances that may materially affect the development of the company's business activities and the state of its assets, in particular its liquidity.	
Upon the request of the Supervisory Board or the General Meeting, attending their meetings and providing supplementary information concerning the above-mentioned reports.	

*Note: The statutory scope of duties of members of the statutory bodies of a general partnership and a limited partnership is, in principle, similar to that applicable to a limited liability company.*

### STATUTORY BODY

- The statutory body acts on behalf of the legal entity in all matters not entrusted by law to the competence of other bodies of the legal entity (e.g., a change of the legal form of the legal entity does not fall within the competence of the statutory body).
- According to Section 13(3) of the Commercial Code: *“The entrepreneur is bound by the acts of the persons exercising the powers of the statutory body, even if, by their acts, they exceeded the scope of the entrepreneur’s business activities, except in cases where the statutory body exceeded the authority vested in it by law or which the law allows to be vested.”*
- The acts of the statutory body therefore bind the company even if, by such acts, the statutory body exceeded the scope of the company’s business activities.
- **A facultative statutory restriction of the authority of the statutory body** with effects vis-à-vis third parties may be adopted by the partners (in a general partnership, limited partnership) or by the relevant body of the legal entity (general meeting, members’ meeting). Such a decision may stipulate that for a legal act binding the legal entity, a joint act of two or more persons in the position of statutory body or members of the statutory body is required.

#### Statutory restrictions of the authority of the statutory body include, for example:

- Cooperative

In cases where a written form is required for a particular act, the signatures of at least two members of the board of directors are necessary (Section 243(3), second sentence of the Commercial Code).

#### Bankruptcy and liquidation

The law restricts the authority of the statutory body to act on behalf of the legal entity

when the legal entity is in liquidation or bankruptcy. In such cases, a person (liquidator, trustee in bankruptcy) is appointed with precisely defined powers under the law to act on behalf of the legal entity, and within the scope of such powers the authority of the statutory body is limited. Thus, **the statutory body cannot act in matters that fall exclusively within the competence of the liquidator or trustee**. However, the appointment of a liquidator or trustee does not terminate the office of the statutory body or its members; their competence is merely limited to those acts which the liquidator or trustee is not authorized to perform (e.g., only the statutory body of a company in liquidation is authorized to convene a meeting of the company’s supreme body).

### AUTHORITY OF THE BANKRUPTCY TRUSTEE TO ACT ON BEHALF OF A LEGAL ENTITY

#### Essence of the activities of a bankruptcy trustee:

- Administration of another’s property – the property of a legal entity
- Acting with professional due care
- According to Section 44(1) of Act No. 7/2005 Coll. on Bankruptcy and Restructuring and on Amendments to Certain Acts (“ZKR”): *“The debtor’s authority to dispose of the assets subject to bankruptcy and the authority to act on behalf of the debtor in matters concerning such assets shall, upon the declaration of bankruptcy, pass to the trustee; the trustee shall act in the name and on the account of the debtor.”*
- Upon the declaration of bankruptcy, the trustee acquires (ex lege) the power of disposition over the assets of the legal entity, including the authority to act in matters concerning such assets, while the statutory body of the legal entity loses such powers. In addition to the transfer of rights of disposition over the debtor’s

property, the trustee also acquires other rights relating to the assets subject to bankruptcy, such as the right of use and the right to the proceeds of such assets. Since the law provides that the trustee acts in the name and on the account of the debtor, the relationship between the trustee and the legal entity is, externally, similar to representation.

- Third parties acting in good faith, who are not aware of the declaration of bankruptcy, are protected when dealing with the statutory body of a legal entity in bankruptcy, but only insofar as the acts do not prejudice the bankruptcy estate; otherwise, such acts are legally ineffective against the creditors, although they remain valid (Section 44(2) ZKR).

### LIQUIDATOR’S AUTHORITY TO ACT ON BEHALF OF A LEGAL ENTITY

#### Essence of the liquidator’s activities:

- acts aimed at liquidation
- acting with professional due care

#### The liquidator acts on behalf of the company only in matters related to the liquidation of the company. In exercising this competence, the liquidator in particular:

- settles the company’s liabilities
- enforces claims and receives performance on behalf of the company
- represents the company before courts and other authorities
- concludes, on behalf of the company, settlements and agreements on the amendment or termination of rights and obligations
- concludes, on behalf of the company, new contracts only in connection with the termination of existing legal relationships
- prepares financial statements as of the date of completion of liquidation submits to the general meeting the financial



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statements and the final report on the course of liquidation

- files a petition for the deletion of the company from the Commercial Register
- if insolvency is established, the liquidator files a petition with the court for the declaration of bankruptcy
- in the event that bankruptcy is declared, during its duration the liquidator exercises his authority only to the extent that it has not passed to the bankruptcy trustee

### RELATIONSHIP WITH THE COMPANY

- The activity of the statutory body (or its member, in the case of a collective body) of a commercial company cannot be performed by a natural person in an employment relationship, not even if such a person is not a shareholder (see Judgment of the Supreme Court of the Slovak Republic, file no. 5Cdo/92/97; Judgment of the Supreme Court of the Czech Republic, file no. 6Cdo/108/92; Judgment of the Supreme Court of the Czech Republic, file no. 21Cdo/1781/2012). However, this does not mean that a statutory body (or its member) cannot enter into an employment contract with the company for the performance of other activities (work) than the performance of the activities of the statutory body.
- To regulate the relationship between the company and its statutory body in managing the company's affairs, a Contract on the Performance of Function is concluded, to which the provisions on mandate contracts apply mutatis mutandis (Section 66(6), first sentence of the Commercial Code).
- The absence of a Contract on the Performance of Function may result in disputes, particularly regarding the amount of remuneration for the performance of the function. According to

Section 571(1) of the Commercial Code: *"If the amount of remuneration is not determined in the contract, the principal shall be obliged to pay the mandatory remuneration that is customary at the time of conclusion of the contract for an activity similar to the activity carried out by the mandatary in managing the matter."*

- The performance of another function at the same level as that of a member of the statutory body or the supervisory board (e.g., General Director / Financial Controller) is, on the contrary, desirable to be carried out under an employment relationship, to the extent and in the manner prescribed by the Labour Code (employment relationship).
- **Position: General Director + Managing Director = RISK OF CONCURRENCE.**

### RESOLUTION OF CONCURRENCE

- The concurrence of the performance of the function of a member of a statutory body and (senior) employee of a commercial company is inadmissible if the same person holds the position of statutory body or member of the statutory body of the company and, at the same time, has concluded an employment contract for a position whose content consists of the same or similar duties as those carried out in the capacity of the statutory body. In practice, this particularly concerns situations where a member of the statutory body of a commercial company concludes an employment contract or so-called management contract for the position of General Director of the company, the subject of which (sometimes even explicitly stated in practice) is the performance of the function of the statutory body.
- A member of the statutory body may, alongside the performance of the function of a member of the statutory body, also carry out managerial activities as a senior employee of the company,

provided that specific conditions are met. The main condition is a detailed and unambiguous definition of the job description of the senior employee, who by law would be authorized to manage and supervise employees positioned at lower levels within the organizational structure. For such activities, the senior employee would be accountable to the statutory body and would submit reports and recommendations to it for decision-making purposes. (Decision of the Regional Court in Trenčín, file no. 5CoPr/5/2018).

- The concurrence/overlap of an employment relationship and a mandate relationship gives rise primarily to the following interpretative issues:
  - ▷ Invalidity of the employment contract to the extent that it overlaps with the duties of the statutory body (Judgment of the Supreme Court of the Czech Republic, file no. 6Cdo/108/92)
  - ▷ Uncertainty as to which type of liability for damages should be applied, since liability for damages under the Labour Code differs from liability for damages under the Commercial Code
  - ▷ Uncertainty regarding the form of asserting a claim for damages
- Conditions for the admissibility of concurrence\*:
  - ▷ a detailed and unambiguous definition of the senior employee's job description in the employment contract
  - ▷ the job description of the senior employee should include the management and supervision of employees who, within the organizational structure, are positioned at lower levels of management
  - ▷ the senior employee should be accountable for his/her activities to

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the statutory body (this may include, for example, submitting reports and recommendations for decision-making) činnosť vedúceho zamestnanca by mal kontrolovať a úlohy mu ukladať štatutárny orgán

- › the activities of the senior employee should be supervised and tasks should be assigned by the statutory body

- › The above restrictions and risks also apply to members of other company bodies (e.g., the supervisory board).

*\*(see Judgment of the Regional Court in Trenčín, file no. 5CoPr/2/2015; Judgment of the Supreme Court of the Czech Republic, file no. 21 Cdo 737/2004; Judgment of the Supreme Court of the Czech Republic, file no. 29 Cdo 2379/2010)*

## LIABILITY FOR THE PERFORMANCE OF FUNCTION

The basic duties applicable to members of statutory bodies and supervisory bodies in commercial companies are:

- performance of their duties with professional / due care
- observance of confidentiality
- compliance with the non-compete obligation

LIMITED LIABILITY COMPANY	
MANAGING DIRECTOR	SUPERVISORY BOARD
<p><i>"Managing directors are <b>obliged to perform their duties with professional due care and in accordance with the interests of the company and all of its shareholders.</b> In particular, they are required to obtain and take into account all available information relevant to the subject of their decision, to <b>maintain confidentiality with respect to confidential information and facts</b> the disclosure of which to third parties could cause harm to the company or jeopardize its interests or the interests of its shareholders, and, in exercising their powers, they must not give preference to their own interests, the interests of only certain shareholders, or the interests of third parties over the interests of the company."</i></p> <p>(Section 135a(1) of the Commercial Code)</p>	<p><i>"The prohibition of competition (§ 136) applies to members of the Supervisory Board, and the provisions of § 135a shall apply accordingly."</i></p> <p>(Section 139(4) of the Commercial Code)</p>
<p><i>Unless otherwise provided by the Memorandum of Association or the Articles of Association, a managing director <b>must not</b>:</i></p> <ol style="list-style-type: none"><li><i>enter into business transactions in his or her own name or on his or her own account that relate to the company's business activities,</i></li><li><i>mediate the company's business transactions for other persons,</i></li><li><i>participate in the business of another company as a partner with unlimited liability, or</i></li><li><i>act as a statutory body or as a member of a statutory or other body of another legal entity with a similar business activity, unless the company in which he or she serves as a managing director, or one of its shareholders, or a person controlled by the same person as the shareholder, participates in that legal entity's business.</i></li></ol> <p>(Section 136(1) of the Commercial Code)</p>	
JOINT-STOCK COMPANY	
BOARD OF DIRECTORS	SUPERVISORY BOARD
<p><i>"Members of the Board of Directors are <b>obliged to perform their duties with due care, which includes the obligation to act with professional due care and in accordance with the interests of the company</b> and all of its shareholders. In particular, they are required to obtain and take into account all available information relevant to the subject of their decision, to <b>maintain confidentiality with respect to confidential information and facts</b> the disclosure of which to third parties could cause harm to the company or jeopardize its interests or the interests of its shareholders, and, in exercising their powers, they must not give preference to their own interests, the interests of only certain shareholders, or the interests of third parties over the interests of the company."</i></p> <p>(Section 194(5) of the Commercial Code)</p>	<p><i>"The provisions of Sections 194(4)–(8), 196, and 196a shall apply mutatis mutandis to members of the Supervisory Board."</i></p> <p>(Section 200(3) of the Commercial Code)</p>

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<p><i>"Unless otherwise provided by the Articles of Association, a member of the Board of Directors <b>must not</b>:</i></p> <ul style="list-style-type: none"> <li><i>a. enter into business transactions in his or her own name or on his or her own account that relate to the company's business activities,</i></li> <li><i>b. mediate the company's business transactions for other persons,</i></li> <li><i>c. participate in the business of another company as a partner with unlimited liability, or act as a statutory body or as a member of a statutory or other body of another legal entity with a similar business activity, unless it concerns a company in which the company, whose statutory body he or she is a member of, participates, or in which one of its shareholders, or a person controlled by the same person as such a shareholder, is a shareholder."</i> <p>(Section 196(1) of the Commercial Code)</p> </li></ul>	
SIMPLE JOINT-STOCK COMPANY	
BOARD OF DIRECTORS OF THE S.J.S.C.	SUPERVISORY BOARD OF THE S.J.S.C.
<p>There is no explicit statutory duty set out in the Commercial Code with respect to the given function. However, by way of analogia legis*:</p> <p><i>"Members of the Board of Directors are <b>obliged to perform their duties with due care, which includes the obligation to act with professional due care and in accordance with the interests of the company</b> and all of its shareholders. In particular, they are required to obtain and take into account all available information relevant to the subject of their decision, to maintain confidentiality with respect to confidential information and facts the disclosure of which to third parties could cause harm to the company or jeopardize its interests or the interests of its shareholders, and, in exercising their powers, they must not give preference to their own interests, the interests of only certain shareholders, or the interests of third parties over the interests of the company."</i> (Section 194(5) of the Commercial Code)</p> <p>*Analogia legis refers to a situation where an unregulated issue is assessed according to the provisions of the same law that govern a similar set of facts.</p>	<p>According to analogia legis (Section 220h(3) of the Commercial Code): "The provisions of Sections 194(4)–(8) and 196a shall apply mutatis mutandis to members of the Supervisory Board."</p> <p>(Section 200(3) of the Commercial Code)</p>
<p><i>"Members of the Board of Directors are obliged to <b>inform the company in writing if they</b>:</i></p> <ul style="list-style-type: none"> <li><i>a. enter into business transactions in their own name or on their own account that relate to the company's business activities,</i></li> <li><i>b. mediate the company's business transactions for other persons,</i></li> <li><i>c. participate in the business of another company as a partner with unlimited liability, or</i></li> <li><i>d. act as a statutory body or as a member of a statutory or other body of another legal entity with a similar business activity, unless it concerns a company in which the company whose statutory body they are a member of participates."</i> <p>(Section 220zd of the Commercial Code)</p> </li></ul>	

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EUROPEAN COMPANY - ONE-TIRE MANAGEMENT SYSTEM	
BOARD OF DIRECTORS	EXECUTIVE DIRECTORS
<p><i>"Provisions of a special law shall apply mutatis mutandis to members of the administrative board of a European Company." (Section 26 of Act No. 562/2004 Coll. on the European Company and on Amendments to Certain Acts)</i></p> <p>The special law referred to is Sections 194(5)–(8), 196 and 196a of the Commercial Code.</p> <p><i>"Members of the Board of Directors <b>are obliged to perform their duties with due care, which includes the obligation to act with professional due care and in accordance with the interests of the company</b> and all of its shareholders. In particular, they are required to obtain and take into account all available information relevant to the subject of their decision, to maintain confidentiality with respect to confidential information and facts the disclosure of which to third parties could cause harm to the company or jeopardize its interests or the interests of its shareholders, and, in exercising their powers, they must not give preference to their own interests, the interests of only certain shareholders, or the interests of third parties over the interests of the company."</i></p> <p>(Section 194(5) of the Commercial Code)</p>	<p><i>"Provisions of a special law shall apply mutatis mutandis to executive directors of a European Company." (Section 31(3) of Act No. 562/2004 Coll. on the European Company and on Amendments to Certain Acts)</i></p> <p>The special law referred to is Sections 135a and 136 of the Commercial Code.</p> <p><i>"Managing directors are <b>obliged to perform their duties with professional due care and in accordance with the interests of the company and all of its shareholders.</b> In particular, they are required to obtain and take into account all available information relevant to the subject of their decision, to <b>maintain confidentiality with respect to confidential information and facts</b> the disclosure of which to third parties could cause harm to the company or jeopardize its interests or the interests of its shareholders, and, in exercising their powers, they must not give preference to their own interests, the interests of only certain shareholders, or the interests of third parties over the interests of the company."</i></p> <p>(Section 135a(1) of the Commercial Code)</p>
<p><i>"Unless otherwise provided by the Articles of Association, a member of the Board of Directors <b>must not:</b></i></p> <ol style="list-style-type: none"> <li><i>enter into business transactions in his or her own name or on his or her own account that relate to the company's business activities,</i></li> <li><i>mediate the company's business transactions for other persons,</i></li> <li><i>participate in the business of another company as a partner with unlimited liability, and</i></li> <li><i>act as a statutory body or as a member of a statutory or other body of another legal entity with a similar business activity, unless it concerns a company in which the company whose statutory body he or she is a member of participates, or in which one of its shareholders, or a person controlled by the same person as such a shareholder, is a shareholder.</i></li> </ol> <p>Section 196(1) of the Commercial Code)</p>	<p><i>"Unless further restrictions follow from the articles of association, a managing director <b>must not:</b></i></p> <ol style="list-style-type: none"> <li><i>conclude transactions in his own name or on his own account that relate to the company's business activity,</i></li> <li><i>broker transactions of the company for other persons,</i></li> <li><i>participate in the business of another company as a partner with unlimited liability, and</i></li> <li><i>act as a statutory body or a member of a statutory or other body of another legal entity with a similar scope of business, unless it concerns a legal entity in which the company in which he acts as managing director participates, or in which one of its shareholders is a shareholder, or an entity controlled by the same person as the shareholder."</i> <p>(§ 136(1) of the Commercial Code).</p> </li></ol>

## ACCOUNTABILITY OF TOP MANAGEMENT

EUROPEAN COMPANY - TWO-TIER SYSTEM OF GOVERNANCE	
BOARD OF DIRECTORS	SUPERVISORY BOARD
<p><i>"Members of the management bodies of an SE, and of its supervisory and administrative bodies, shall be liable, in accordance with the provisions applicable to public limited-liability companies in the Member State in which the SE has its registered office, for loss or damage sustained by the SE through any breach of their legal, statutory or other obligations in the course of their duties." (Article 51 of Council Regulation (EC) No. 2157/2001 on the Statute for a European Company (SE).</i></p> <p><i>"The status and legal relations concerning a European Company which are not regulated by a special regulation (i.e. Regulation No. 2157/2001) or by this Act shall be governed mutatis mutandis by the provisions on a joint-stock company under a special Act." (§ 1(2) of Act No. 562/2004 Coll. on the European Company and on amendments to certain acts). The special Act is the Commercial Code.</i></p> <p><i>"Members of the board of directors <b>are obliged to perform their duties with due care</b>, which includes the obligation to act <b>with professional care and in accordance with the interests of the company</b> and all of its shareholders. In particular, they are required to obtain and, when making decisions, take into account all available information relating to the subject of the decision, to maintain confidentiality regarding confidential information and facts, the disclosure of which to third parties could cause damage to the company or endanger its interests or the interests of its shareholders, and, in the performance of their duties, they must not give preference to their own interests, the interests of only certain shareholders, or the interests of third parties over the interests of the company."</i></p> <p>(§ 194(5) of the Commercial Code).</p>	<p><i>"Members of the management bodies of an SE, and of its supervisory and administrative bodies, shall be liable, in accordance with the provisions applicable to public limited-liability companies in the Member State in which the SE has its registered office, for loss or damage sustained by the SE through any breach of their legal, statutory or other obligations in the course of their duties." (Article 51 of Council Regulation (EC) No. 2157/2001 on the Statute for a European Company (SE).</i></p> <p><i>"The status and legal relations concerning a European Company which are not regulated by a special regulation (i.e. Regulation No. 2157/2001) or by this Act shall be governed mutatis mutandis by the provisions on a joint-stock company under a special Act." (§ 1(2) of Act No. 562/2004 Coll. on the European Company and on amendments to certain acts). The special Act is the Commercial Code. The provisions of Sections 194(4) to (8).</i></p> <p><i>Section 196 and Section 196a shall apply mutatis mutandis to members of the supervisory board."</i></p> <p>(§ 200(3) of the Commercial Code).</p>
<p><i>"Unless further restrictions follow from the articles of association, a member of the board of directors <b>must not</b>:</i></p> <ol style="list-style-type: none"> <li><i>conclude transactions in his own name or on his own account that relate to the company's business activity,</i></li> <li><i>broker transactions of the company for other persons,</i></li> <li><i>participate in the business of another company as a partner with unlimited liability, and</i></li> <li><i>act as a statutory body or a member of a statutory or other body of another legal entity with a similar scope of business, unless it concerns a company in which the company whose statutory body he is a member participates, or in which one of its shareholders is a shareholder, or an entity controlled by the same person as the shareholder."</i> <p>(§ 196(1) of the Commercial Code).</p> </li></ol>	

## ACCOUNTABILITY OF TOP MANAGEMENT

COOPERATIVE	
SUPERVISORY COMMITTEE	AUDIT COMMITTEE
<p><i>"Members of the board of directors <b>are obliged to perform their function with due care and in accordance with the interests of the cooperative and all of its members.</b> In particular, they are required to obtain and, when making decisions, take into account all available information relating to the subject of the decision, <b>to maintain confidentiality</b> regarding confidential information and facts, the disclosure of which to third parties could cause damage to the cooperative or endanger its interests or the interests of its members, and, in the performance of their duties, they must not give preference to their own interests, the interests of only certain members, or the interests of third parties over the interests of the cooperative."</i></p> <p>(§ 243a(f) of the Commercial Code).</p>	<p><i>"The provisions of Section 243a shall apply mutatis mutandis to the duties and liability of members of the audit committee."</i></p> <p>(§ 244(8) of the Commercial Code).</p>
<p><i>"Members of the <b>board of directors</b> and the audit committee of a cooperative, procurists and the director must not be entrepreneurs nor members of statutory or supervisory bodies of legal entities with a similar scope of business. The articles of association may regulate the scope of the non-compete obligation differently."</i></p> <p>(§ 249 of the Commercial Code).</p>	<p><i>"Members of the board of directors and <b>the audit committee of a cooperative</b>, procurists and the director <b>must not</b> be entrepreneurs, nor members of statutory or supervisory bodies of legal entities with a similar scope of business. The articles of association may regulate the scope of the non-compete obligation differently."</i></p> <p>(§ 249 of the Commercial Code).</p>

## FUNCTION PERFORMANCE LIABILITY FOUNDATION

- *"The foundation administrator is the statutory body of the foundation, which manages the activities of the foundation and acts on its behalf. The administrator decides on all matters of the foundation, unless such matters are reserved by this Act or the foundation deed to other bodies."* [Section 25(1) of Act No. 34/2002 Coll. on Foundations and on the Amendment of the Civil Code, as amended ("Foundations Act")].
- *"Members of the bodies of a foundation are obliged to carry out their activities in such a way that the interests of the foundation are not harmed; they may not use the assets of the foundation for personal purposes. Members of the bodies of a foundation must be of good character and fully legally competent. For the purposes of this Act, a person who has been finally convicted of an intentional criminal offence is not considered to be of good character."* [Section 19(2), first and second sentence, Foundations Act].

- The Foundations Act does not impose on the foundation administrator and other members of foundation bodies (members of the supervisory board) such a wide scope of duties in relation to their office as is the case with some other legal entities (commercial companies).
- The need to apply other legal norms by way of analogia iuris. With respect to liability for damages, this will primarily be the Civil Code as the general legal regulation, since a foundation is, under Section 18(2) (b) of the Civil Code, a legal entity – a special-purpose association of assets established and operating under civil law.
- If the foundation administrator performs an act in conflict with the legal order, the foundation deed, or a contract concluded after appointment to office, as a result of which the foundation incurs an obligation towards a third party (e.g., an obligation to compensate another person for damage), the foundation is bound by such obligation. After fulfilling it, the foundation has the right to recover from the foundation administrator the damage it suffered as a consequence of the administrator's conduct, based on

the relevant provisions of the Civil Code (Section 440 of the Civil Code). The foundation administrator may, however, be released from liability by proving that the damage was not caused by his fault.

- The above is also supported by the fact that liability insurance for damage caused by members of company bodies, so-called D&O insurance (directors and officers insurance), may be arranged not only for the bodies of commercial companies but also for members of the bodies of a foundation, meaning that these persons also bear liability.

## DUE CARE – WHAT DOES IT ACTUALLY MEAN?

- The content of the term is not defined in the Commercial Code
- Basic rules:
  - › before making a decision, obtain and take into account all available information (e.g., reporting obligations, regular internal controls concerning the proper performance of functions by subordinates, an effective compliance department with a direct

reporting obligation to the members of the board of directors, etc.)

- › maintain confidentiality regarding confidential information and facts that could in any way jeopardize the interests of the company or its shareholders
- › not to prioritize one's own interests, or the interests of only certain partners / shareholders / members
- Adopt decisions and exercise authority as if the statutory body or its member were an expert / professional in the given field.
- Recognize when he or she no longer possesses sufficient knowledge or practical expertise:
  - › Timely request for assistance and support from a specialist in the relevant sector
  - › Proper selection of the specialist



### PROPER SELECTION OF A SPECIALIST / EXPERT

- If a member of the statutory body is limited by knowledge or experience in a specific field, business sector, or subject matter of decision-making, and seeks to meet the objective criteria of decision-making (i.e., to act as a knowledgeable person in that field would act), it is recommended in such cases to request the assistance and support of a specialist in the relevant area.
- For this reason, in practice, members of statutory bodies often entrust certain agendas either to the heads of specific departments or to external advisors (e.g., external accountants), and in their decision-making they apply and take into account the professional recommendations provided. However, the choice of advisor / supplier / designation of department heads, etc., is again, in principle, a decision that should itself be taken with due care.
- Adopting a decision based on the recommendations of an insufficiently qualified person (appointed by the member himself), or entrusting a specific agenda to an insufficiently qualified person, may again constitute a breach of the duty to act with due care. (See Judgment of the Supreme Court of the Slovak Republic, file no. 3 Obo 106/2006 of 1 July 2007: "It is clear that managing directors are liable for the state of bookkeeping and the prescribed records, regardless of whether they carry out these activities personally or whether they ensure them through other legal entities or natural persons.").
- A member of the statutory body is obliged, in the performance of his function, to use his professional knowledge, or, if he does not possess such knowledge himself, to entrust the activity to another person. In such a case, the managing director is obliged to preserve the standard of due care when selecting a qualified person. This follows, for example,

from the judgment of the Supreme Court of the Czech Republic, file no. 29 Cdo 2531/2008: *"The conclusion of the appellate court, according to which, if a managing director does not have the necessary expertise to handle matters falling within the performance of his office, he is obliged to ensure that such matters are assessed by a person possessing the necessary expertise, while part of the duty of due managerial care is the ability to recognize which activities he is no longer able to perform or for which he lacks the necessary knowledge and skills, is considered correct by the Supreme Court (see, for example, the judgment of the Supreme Court of 10 November 1999, file no. 29 Cdo 1162/99, published in the journal Soudní judikatura, issue no. 9, year 2000, under no. 103, which the appellate court rightly referred to). If, therefore, the defendant, as managing director of the plaintiff company, concluded a contract for the provision of legal services with an attorney – i.e., a person professionally qualified to assess the legal aspects of a real estate transfer – whereby the subject matter of the contract was the attorney's obligation to provide the plaintiff with legal services in relation to the evaluation of bids in a public tender for the sale of an agricultural hall, the drafting of the purchase contract for this real estate, and representation before the cadastral office, then he acted (in this respect) with due managerial care (provided that, given the information available, he had no reason to doubt the attorney's professional competence)."*

### WHEN DOES LIABILITY ARISE?

- For liability for damages to arise, the cumulative fulfillment of three conditions is required:
  - › the occurrence of damage
- Damage is manifested as:
  - › **Actual damage** – harm consisting in



the reduction of the injured party's assets and representing the value that would have to be expended to restore the thing to its original state, or harm consisting in the increase of the injured party's liabilities.

- › **Lost profit** – pecuniary harm consisting in the fact that the injured party did not achieve what he would have achieved had the harmful event not occurred; it is pecuniary harm consisting in the failure to realize an increase in the injured party's assets, although such an increase could reasonably have been expected.
- breach of a specific duty
  - › The law does not exhaustively define which duties of the statutory body are concerned. The Commercial Code only provides exemplary duties, the breach of which gives rise to liability towards the company for damages (e.g., providing performance to shareholders in violation of the Commercial Code, acquisition of assets contrary to Section 59a of the Commercial Code, etc.).
- causal nexus between the occurrence of damage and the breach of duty
  - › The question of causation is a factual issue that must be resolved in the specific context as a direct link of objective circumstances in which one phenomenon (the cause) gives rise to another phenomenon (the effect). The main feature of causation is the directness of the influence of the cause on the given effect, where the cause immediately precedes the effect and directly produces it. Cause and effect must therefore be in a direct, immediate, and uninterrupted relationship; it is not sufficient if the relationship is only mediated. (See Judgment of the Supreme Court of the Slovak Republic, file no. 3 Cdo 130/2010).

This is a case of strict liability, where fault (the question of the internal mental attitude of the wrongdoer towards the consequences of his conduct) is not examined. For establishing liability, it is not at all decisive whether the conduct was intentional or negligent.

### SOLIDARY VS. INDIVIDUAL LIABILITY FOR THE PERFORMANCE OF FUNCTION

#### Individual liability

In the case of an individual body (e.g., a managing director), the question of the extent of liability is relatively clear – the person is liable for his or her own actions.

#### Joint and several liability

In the case of a collective body of a commercial company, i.e., where the body consists of several persons (e.g., board of directors, supervisory board), the question arises as to how these members of the company's body will be held liable. In practice, both forms of liability – joint and several and individual – may be considered.

For joint-stock companies, joint and several liability applies by law, see Section 194(6) of the Commercial Code: *"Members of the board of directors who breach their duties in the performance of their office shall be jointly and severally obliged to compensate the company for the damage thereby caused ..."* and Section 200(3) of the Commercial Code: *"The provisions of Section 194(4) to (8), Section 196 and Section 196a shall apply mutatis mutandis to members of the supervisory board."*

Similarly, collective liability also applies in limited liability companies, see Section 136a(2), first sentence of the Commercial Code: *"Managing directors who breach their duties in the performance of their office shall be jointly and severally obliged to compensate the company for the damage thereby caused."*

There is no clear and relevant case law addressing the issue of joint and several liability in situations where, for example, a person did not participate in the unlawful conduct, or in the conduct of a collective body that is contrary to the resolution of the general meeting or to the interests of minority shareholders, etc., which was preceded by a decision-making process of the body where not all members voted "in favour", and some even expressly raised objections to the unlawfulness of such conduct and thus opposed the other members of the collective body.



However, the application of Section 383 of the Commercial Code may come into consideration: *"If several persons are liable for damages, they shall be obliged to compensate the damage jointly and severally, and among themselves they shall settle according to the extent of their liability."*



## ACCOUNTABILITY OF TOP MANAGEMENT

This provision of the Commercial Code, apart from reiterating and generally defining the principle of joint and several liability for all commercial law relations, also regulates the issue of so-called recourse (regress) according to the degree of liability. From this it can be inferred that all members of the collective body of a company should be liable; however, the member whose liability was lower, or none at all, should have the right to claim from those who are actually responsible full compensation to the extent in which he was obliged to satisfy the entitled party, i.e., the injured party.

These conclusions also follow from Section 135a(3), first sentence of the Commercial Code: *“A managing director shall not be liable for damage if he proves that, in the performance of his duties, he acted with due care and in good faith that he was acting in the interest of the company.”* and similarly from Section 197(7), first sentence of the Commercial Code: *“A member of the board of directors shall not be liable for damage if he proves that, in the performance of his duties, he acted with due care and in good faith that he was acting in the interest of the company.”*

### RECOMMENDATIONS FOR MEMBERS OF COLLECTIVE BODIES:

- Consider each vote carefully – with due care and in line with the interests of the company and all of its shareholders / members.
- In the case of voting “against” – seek to reverse the decision, e.g., by having one’s dissent recorded in the minutes, informing the auditor, the audit committee, the supervisory board, and taking other measures to prevent the implementation of the decision.

### LIABILITY FOR THE PERFORMANCE OF FUNCTION – CONSEQUENCES

- Removal from office
- Imposition of a contractual penalty
- Company’s claim for damages caused
- Loss of entitlement to insurance coverage under D&O insurance
- Liability for administrative / criminal sanctions
- Claims of the company for damages against members of the statutory body may also be exercised, in their own name and for their own account, by a creditor of the company if the creditor cannot satisfy its claim from the company’s assets. Creditors’ claims against members of the statutory body do not lapse if the company waives its claims for damages or concludes a settlement agreement with them. If bankruptcy is declared on the company’s assets, creditors’ claims against members of the statutory body shall be exercised by the bankruptcy trustee.

### LIMITATION OF LIABILITY – PREVENTIVE MECHANISMS

#### Without legal relevance:

- Agreements on the limitation / exclusion of liability
- Limitation / exclusion of liability in the articles of association
- Approval of conduct by another corporate body other than the general meeting (e.g., by the supervisory board)

They are not effective vis-à-vis third parties, even if such limitation was known to the third party or was published (§ 13(4) of the Commercial Code). The consequence of their breach is the liability of the statutory body towards the company.

#### With legal relevance:

- Execution of a resolution of the general meeting (except where it is contrary to

legal regulations, the articles of association or bylaws, and the duty to file for bankruptcy).

- Proof of acting with due care, in good faith, and in the interest of the company and its shareholders / members.
- Waiver of claims for damages by the company / conclusion of a settlement agreement, but only after three years from their occurrence (subject to approval by the general meeting and without objection from minority shareholders or members). Such waiver of claims, however, is not effective vis-à-vis the creditors of the company, who remain entitled to pursue the company’s claims against the statutory body, but in their own name and for their own account.

Examples of setting up liability limitations within a company:

- implementation of effective management processes with allocated and efficient risk management,
- clear and precise allocation of competences and powers,
- “four-eyes” principle,
- carrying out regular as well as random audits,
- regular review and improvement of procedures and processes,
- training,
- technical support,
- modernisation of processes,
- conclusion of insurance policies, etc.

Despite the relatively strict legal framework of liability, Slovakia has not yet seen a broad application of claims for damages against members of statutory and supervisory bodies of commercial companies in the commercial law sphere. However, this does not apply in the administrative law sphere in the imposition of sanctions, or in the criminal law sphere.

## ACCOUNTABILITY OF TOP MANAGEMENT

### SPECIAL TYPES OF LIABILITY

TYPE	CONSEQUENCE (SANCTION)	RESPONSIBLE PERSON	CLAIM	DETAIL OF SANCTION
Objective liability Commercial Code	Dismissal from Office Contractual Penalty Compensation for Damage	Member of the Statutory Body and the Supervisory Board	Company Creditor	Actual Damage and Lost Profit
Liability under the Labour Code (Negligence-Based)	Compensation for Damage	Employee	Company	Maximum of Four Times the Average Monthly Wage
Liability under the Labour Code (Intentional, for Entrusted Assets/Items)	Compensation for Damage Termination of Employment	Employee	Company	Actual Damage and Lost Profit
Administrative Liability and Criminal Sanctions (on criminal liability of legal en- tities and on amendments to certain laws	Monetary Penalty/Fine Publication of the Decision Prohibition of Activity Company's Right of Recourse	Member of the Statutory Body and the Supervisory Board	Law Enforcement Authorities	According to the Degree of Fault, the Extent of the Damage or Harm Caused, etc.
Criminal Liability of a Natural Person	Imprisonment Monetary Penalty Prohibition from Engaging in Certain Employment or Activities, etc.	Member of the Statutory Body and the Supervisory Board	Law Enforcement Authorities	According to the Degree of Fault, the Extent of the Damage or Harm Caused, etc.

### LIABILITY OF THE CONTROLLING PERSON FOR THE INSOLVENCY OF THE CONTROLLED PERSON

- *“The controlling person shall be liable to the creditors of the controlled person for the damage caused by the insolvency of the controlled person if, by its conduct, it has substantially contributed to the insolvency of the controlled person. The controlling person shall be released from such liability if it proves that it acted with due information and in good faith believing that it was acting in the interest of the controlled person.”* (Section 66aa(1) of the Commercial Code).
- The fundamental prerequisite for the establishment of this liability is the existence of a relationship between the controlled and the controlling person pursuant to Section 66a of the Commercial Code.
- Liability arises in relation to the insolvency of the controlled person. Pursuant to Section 66aa(2) of the Commercial Code, the controlled person is also presumed to be insolvent (in addition to the basic definition under Section 3(1) of the Bankruptcy and Restructuring Act: *“A debtor is insolvent if it is unable to pay its debts as they fall due or if it is over-indebted.”*) if bankruptcy proceedings against the assets of the controlled person could not be opened or were cancelled due to a lack of assets, or if enforcement or similar execution proceedings conducted against the controlled person were terminated for the same reason.
- Liability may arise if the controlling person has, through its conduct, substantially contributed to the insolvency of the controlled person, meaning that the conduct of the controlling person does not have to be the sole cause of the insolvency of the controlled person; it is sufficient if it has contributed to it in a substantial manner.
- The controlling person may be released from liability if it proves that it acted with due information and in good faith believing that it was acting in the interest of the controlled person. This corresponds to the principle known in foreign legal systems as the “business judgment rule,” although, in the case of controlling persons who are shareholders, the same level of care and loyalty as required from members of statutory bodies is not demanded. (See the Explanatory Report to the Amendment to the Commercial Code No. 264/2017 Coll.)
- In the event that the controlling person is a legal entity established under the laws of the Slovak Republic, this liability shall

also extend to the statutory body acting on behalf of the controlling person. This means that the statutory body is obliged to manage the controlling person in such a manner as to prevent it from contributing to the insolvency of the controlled person.

### LIABILITY FOR OVERCOMING A CRISIS

- A company is considered to be in crisis if:

- › it is insolvent;

The legal definition of insolvency is set out in Section 3 of the Bankruptcy and Restructuring Act (ZKR), which distinguishes between the state of insolvency and over-indebtedness. *“A legal entity is insolvent if it is unable to fulfil, for more than 90 days after their due date, at least two monetary obligations owed to more than one creditor. For the purpose of assessing a debtor’s solvency, all claims that originally belonged to a single creditor during the 90 days prior to the filing of a bankruptcy petition shall be considered as one claim. A natural person is insolvent if it is unable to fulfil, for more than 180 days after the due date, at least one monetary obligation. If a monetary claim cannot be enforced against the debtor through execution, or if the debtor has failed to comply with the obligation imposed by a notice under Section 19(1) (a), the debtor shall be presumed to be insolvent.”* (Section 3(2) of the Bankruptcy and Restructuring Act).

*“A person is over-indebted if it is required to keep accounting records under a special regulation, has more than one creditor, and the value of its liabilities exceeds the value of its assets. When determining the value of liabilities and the value of assets, the accounting records or an expert opinion shall*

*be used, with the expert opinion taking precedence over the accounting records. Consideration shall also be given to the expected results of the further management of the assets, or the expected results of the continued operation of the enterprise, if, in view of all the circumstances, it may reasonably be assumed that such management or operation can continue. The amount of liabilities shall not include liabilities subordinated under a subordination obligation, nor liabilities that would be satisfied in bankruptcy proceedings as subordinated claims.”* (Section 3(3) of the Bankruptcy and Restructuring Act).

- › it is at risk of insolvency;

Pursuant to Section 4(1) and (2) of the Bankruptcy and Restructuring Act, a debtor is in imminent insolvency, in particular if it is at risk of becoming unable to pay its debts. A debtor is deemed to be at risk of insolvency if, taking into account all the circumstances, it can be reasonably assumed that the debtor will become insolvent within the following 12 calendar months.

- Pursuant to Section 67a(1) and (2) of the Commercial Code: *“A company is in crisis if it is insolvent or if its insolvency is imminent. If the company has been dissolved, it shall have the obligations of a company in crisis until it enters into liquidation. A company is also considered to be in crisis if the ratio of its equity to liabilities is less than 8 to 100.”*
- The ratio of 8 to 100 is calculated as the proportion of the company’s equity (line 25 of the individual financial statements) to its liabilities (line 34 of the individual financial statements).
- The knowledge of the statutory body about the company’s crisis gives rise



to the statutory body’s obligation to take steps—unspecified in detail by the Commercial Code—aimed at overcoming the crisis.

- Measures that the statutory body may adopt in relation to a company’s crisis include:
  - › a decision to implement such changes to the company’s business structure as would adjust the ratio of equity to liabilities in a manner enabling the company to overcome the crisis;
  - › convening a general meeting (or members’ meeting) at which the shareholders or members shall be presented with appropriate measures to adjust the ratio of equity to liabilities, such as the capitalization of receivables (through an increase in registered capital or other capital funds);
  - › if the company is insolvent, to take steps in accordance with the Bankruptcy and Restructuring Act, such as appointing an administrator to prepare a restructuring opinion (Section 108(1) of the Act), subsequently filing a petition for the company’s restructuring, or, if the statutory

conditions under the Bankruptcy and Restructuring Act are met, filing a petition for the declaration of bankruptcy (Section 11(2) of the Act);

### It applies to the following persons:

- › members of the statutory body of a limited liability company (s. r. o.), joint-stock company (a. s.), simple joint-stock company (j. s. a.), and limited partnership (k. s.) in which no natural person is a general partner, with the exception of banks, electronic money institutions, insurance companies, reinsurance companies, health insurance companies, asset management companies, securities traders, stock exchanges, central securities depositories, collective investment undertakings, payment system operators, pension fund management companies, supplementary pension companies, payment institutions, and creditors authorized to provide consumer loans without limitation as to scope; which cannot be considered companies in crisis. (Section 67i of the Commercial Code).

### • Consequences:

- › the establishment of liability of the statutory body, similarly to cases of breach of other general duties of the statutory body, as described in the preceding section;

## LIABILITY FOR BREACH OF THE PROHIBITION ON THE REPAYMENT OF PERFORMANCE SUBSTITUTE FOR EQUITY

### The Concept of Performance Substituting for Equity

- A performance substituting for equity shall be deemed to include a loan or a similar performance of an equivalent economic nature provided to a company in crisis;
- by a member of the statutory body, an

employee directly subordinate to the statutory body, a procurator, the head of a branch office, or a member of the supervisory board;

- by a person who holds, directly or indirectly, at least a 5% share in the company's registered capital or voting rights, or who is able to exercise an influence over the management of the company comparable to the influence corresponding to such a share;
- by a silent partner;
- by a person related to any of the persons referred to in points (a), (b) or (c),
- or by a person acting on behalf of any of the persons referred to in points (a), (b) or (c).

This shall apply equally to any performance provided by the company on the basis of a guarantee, assumption of debt, pledge, or any other security provided by the company to secure the obligations of a shareholder or for the shareholder's benefit.

**Presumption:** it is presumed that a performance substituting for equity, provided by a person whose ultimate beneficial owner cannot be identified, shall be deemed to have been provided by one of the persons referred to above.

- A performance substituting for equity, together with any accessories and contractual penalties, may not be repaid if the company is in crisis or if such repayment would result in the company entering into crisis. During this period, the time limits for the repayment of such performance shall be suspended.
- The prohibition on the repayment of performance substituting for equity is directly linked to the company's financial condition—that is, whether the company is currently in crisis or whether, after overcoming the crisis, it would re-enter crisis as a result of such repayment.

- In the event that a performance substituting for equity has been unlawfully repaid, the person who received such performance is obliged to return its value to the company. Furthermore, members of the statutory body who held office at the time of the repayment of the performance substituting for equity (regardless of the form or circumstances of the repayment), as well as **members of the statutory body** who held office at the time when the claim for the return of the unlawfully repaid performance was not enforced, despite their objective or subjective knowledge of the obligation to pursue such recovery, **shall bear statutory liability towards the company and its creditors for the return of the unlawfully repaid performance.**
- Among the individual members of the statutory body, passive solidarity arises in respect of this liability, meaning that each member of the statutory body is bound to the same performance, and the company is entitled to claim the full performance from any one of them. The fulfilment of the obligation by one member of the statutory body towards the company extinguishes this obligation for all other members of the statutory body.

### • Consequences:

- › the establishment of statutory liability;
- › the establishment of liability of the statutory body, similarly to cases of breach of other general duties of the statutory body, as described in the preceding section;

## LIABILITY FOR BREACH OF THE PROHIBITION ON THE RETURN OF A CAPITAL CONTRIBUTION

### The Concept of the Prohibition on the Return of Capital Contributions as Regulated by the Commercial Code:

- **Limited Partnership (k. s.):** *“A limited*

*partner shall be obliged to contribute to the company an amount specified in the partnership agreement, but not less than EUR 250. The contribution shall be paid within the period specified in the partnership agreement, otherwise without undue delay after the formation of the company or after the commencement of the partner's participation in the company. The company shall not return the contributions of the limited partners.” (Section 93(3) of the Commercial Code).*

- **Limited liability company (s.r.o.):** “The company shall not return the contributions of its shareholders. Payments made to shareholders in connection with a reduction of the registered capital and payments made to shareholders from the use of the capital fund created from contributions (Section 217a) shall not be considered a return of contributions.” (Section 123(3) of the Commercial Code).
- **JSC (a.s.):** “The company must not return contributions to its shareholders.” (§ 179(2) of the Commercial Code)
- **Cooperative (družstvo):** “A cooperative must not return membership contributions to its members or pay interest on such contributions, unless otherwise provided by law.” (§ 223(8) of the Commercial Code)
- Additionally, a return of contribution is also deemed to include any performance **without adequate counter-performance**, provided by the company on the basis of a legal act concluded with the shareholder or for the shareholder's benefit, regardless of the form or validity of such arrangement. This also applies to any performance by the company provided as a result of a guarantee, assumption of obligation, pledge, or other security provided by the company to secure obligations of the shareholder or for their benefit. (§ 67j(2) of the Commercial Code)

### Consequences of Breaching the Prohibition on Return of Contributions:

- In the event of a breach of the statutory prohibition on the return of a contribution to a shareholder of a capital company, the sanction is the obligation of the shareholder to return to the capital company the value of the unlawfully returned contribution.
- Members of the statutory body who held office at the time of the unlawful return of a capital contribution, the members of the statutory body shall be **jointly and severally liable for ensuring its return to the company**. This liability shall also extend to those who held the position of a member of the statutory body during the period in which the company failed to enforce its claim for the return of the contribution, provided that, taking into account all the circumstances, they knew or could have known of this obligation.



- Among the individual members of the statutory body, passive solidarity arises in respect of this liability, meaning that each member of the statutory body is bound to the same performance, and the company is entitled to demand full performance from any one of them. The fulfilment of the obligation by one member of the statutory body towards the company extinguishes this obligation for all other members of the statutory body.

### Consequences:

- › the establishment of statutory liability;
- › the establishment of liability of the statutory body, similarly to cases of breach of other general duties of the statutory body, as described in the preceding section;

### LIABILITY FOR FAILURE TO COMPLY WITH THE DUTY TO FILE A PETITION FOR BANKRUPTCY

- “A debtor that is a legal entity shall be obliged to file a petition for the declaration of bankruptcy within 30 days from the date on which it became aware, or could have become aware through the exercise of professional care, of its over-indebtedness. This obligation shall also apply, on behalf of the debtor, to the debtor's statutory body or a member thereof, the debtor's liquidator, and the debtor's legal representative. It is established that, in the event of a failure to file a petition for the declaration of bankruptcy in due time, a relationship of liability arises between a limited liability company, a simple joint-stock company, or a joint-stock company and the person obliged to file the petition on its behalf, in an amount equal to one half of the minimum registered capital required for a joint-stock company.

*The emergence of this claim shall not be precluded even if the debtor is the legal successor of a company dissolved without liquidation. Any agreement between a limited liability company, a simple joint-stock company, or a joint-stock company and the person obliged to file the petition for the declaration of bankruptcy on its behalf, which excludes or limits the right to such contractual penalty, shall be prohibited; neither the articles of association nor the statutes may limit or exclude the right to its payment.*



*The company may not waive its right to payment of the contractual penalty or enter into a settlement agreement in respect thereof; set-off or any other form of settlement shall not be permitted. The arising of the right to the contractual penalty shall not affect the entitlement to claim damages exceeding the amount of the contractual penalty.” (Section 11(2) of the Bankruptcy and Restructuring Act)*

- „A person obliged to file a petition for the declaration of bankruptcy on behalf of the debtor pursuant to Section 11(2) shall be liable for the damage caused to the debtor’s creditors as a result of a failure to file the petition for the declaration of bankruptcy in due time.” (Section 11a(1) of the Bankruptcy and Restructuring Act)

- **It applies to the following persons:**

- › the statutory body, or the members of the statutory body if it is a collective body (e.g. the board of directors of a joint-stock company);
- › the former statutory body, or the former members of the statutory body (if no statutory body is currently appointed, i.e. where all members have resigned or their term of office has expired);
- › the legal representative (e.g. the head of a branch, an authorised person, or a person in charge of an establishment);
- › the liquidator, if the declaration of bankruptcy was preceded by the liquidation of the company;

- **Consequences / Possible impact on private assets**

- › Risk of a fine (€ 12,500)
- › Liability for damages caused to the company’s creditor
- › Exclusion, i.e., a ban on performing the function of a member of the

statutory body or a member of the supervisory body in a business company or cooperative for the period specified in the exclusion decision; this also applies to acting as the head of an organizational unit of a company, head of a foreign entity’s business, head of an organizational unit of a foreign entity’s business, or proxy.

- › Criminal offense of obstructing bankruptcy or settlement proceedings

### LIABILITY FOR FAILURE TO PROVIDE REQUIRED COOPERATION TO THE BANKRUPTCY ESTATE ADMINISTRATOR

- *“The bankrupt party is obliged to provide the administrator with the required cooperation, especially all explanations requested by the administrator in the form and within the deadline set by the administrator. For this purpose, the bankrupt party is also obliged to appear repeatedly upon request at the administrator’s office. In the request for cooperation, the administrator shall always inform the bankrupt party of the criminal- law consequences of failing to fulfill their obligation.” (§ 74 paragraph 1 of the Bankruptcy and Restructuring Act).*

- **Persons obliged to provide cooperation (§ 74 paragraph 2 of the Bankruptcy and Restructuring Act):**

- › The statutory body, or a member of the statutory body if the statutory body is collective (e.g., the board of directors of a joint-stock company)
- › Former statutory body or former members of the statutory body who last performed this function in the bankrupt party (if the statutory body is not established, i.e., if all statutory representatives resigned or their function has ceased)

- › Proxy (prokurista), if appointed
- › Representative responsible for the debtor’s business
- › Legal representative (e.g., head of an organizational unit, authorized person, person at the business premises)
- › Liquidator, if liquidation of the company preceded the declaration of bankruptcy
- › Compulsory administrator, if compulsory administration preceded the declaration of bankruptcy

- **Consequences:**

- › Risk of a fine of €165,000 (§ 74 paragraph 5 of the Bankruptcy and Restructuring Act)
- › Exclusion (§ 74 paragraph 6 of the Bankruptcy and Restructuring Act)
- › Commission of the criminal offense of obstructing bankruptcy proceedings (§§ 242 et seq. of the Criminal Code)



### LIABILITY FOR ADMINISTRATIVE/ CRIMINAL SANCTIONS

- In addition to the above, demonstratively listed types of liabilities related to breaches of certain duties of senior management, there are numerous other obligations of the company depending on its area of activity (e.g., sectors such

as food law, automotive, products, etc.), where the administrative (control) authority has the power to impose various fines upon finding statutory violations.

- The amount of the fine always depends on the discretionary judgment of the controlling authority, but within the limits set by law.
- In such a case, the company is entitled to seek recourse for any administrative sanctions imposed on the company due to the fault of the statutory body or its members.
- Additionally, apart from the recourse claim by the company, in some specific cases, a fine may also be imposed directly on the members of the statutory body who have violated the company's obligations.
- Effective Defense for Members of the Statutory Body:
  - › Clear determination of competences and powers in the area of management – the person responsible can only be held accountable if they violated a clearly defined duty, the breach of which led to the administrative sanction
  - › Demonstrating the failure of an individual in the given procedure/process – conducting internal investigations
  - › Regular review of procedures and improvements in their effectiveness as part of ongoing evaluations of functionality and efficiency

### LIABILITY OF PERSONS MANAGING THE COMPANY THROUGH A “WHITE HORSE”

- “The mandatary’s duties also apply to a person who factually exercises the powers of a statutory body or a member of the statutory body, without being formally appointed or designated to such a function. Such a person

*is particularly obliged to act with professional care in accordance with the interests of the company and all its shareholders. In case of breach of these duties, they bear the same liability as the statutory body or member of the statutory body.” (§ 66 (7) of the Commercial Code).*

- The same liability as statutory bodies is also borne by persons (both legal entities and natural persons) who are not formally established or appointed to the position of a statutory body, but nevertheless effectively decide on the activities and management of the given company and de facto perform the function of a statutory body. De facto statutory representatives are therefore those persons who are authorized to exercise business management, determine its content and direction, delegate the management of the company, and supervise its fulfillment, all without the need for authorization or prior consent or subsequent approval by the formally established or appointed statutory body. (See the explanatory report to the amendment of the Commercial Code No. 264/2017 Coll.).
- Consequences of unlawful conduct of de facto statutory representatives:
  - › extension of liability of formally appointed statutory representatives, i.e., “white horses,” also to de facto statutory representatives, whose liability is identical
  - › the threat of assessing such conduct as a criminal offense of fraudulent liquidation.

*“Whoever, with the intent to thwart the resolution of business termination by liquidation, seeks out or mediates another person who merely lends their name and identity to assume rights and obligations which they have no genuine interest in exercising, for the purpose of transferring*

*participation in a legal entity to such a person or for the purpose of appointing such a person as a statutory body or a member of a statutory body of a legal entity, shall be punished by imprisonment for up to five years.” (§ 251b (1) of the Criminal Code).*

This provision is intended to sanction “white horses” as well as persons participating in actions related to the transfer of ownership interest in legal entities to white horses. See the explanatory report to the amendment of the Commercial Code No. 264/2017 Coll.

In the case of fulfillment of the qualified offense, imprisonment for up to 15 years may be imposed.

### LIABILITY OF FORMER MEMBERS OF THE STATUTORY BODY

*“If the sole statutory body of the company is not registered in the Commercial Register within 60 days after the expiry of the deadline under paragraph 1, the person who last performed the function of the sole statutory body of the company is obliged to submit a proposal for the dissolution of the company within 30 days.” (§ 66 (3) of the Commercial Code).*

*“Unless otherwise provided by a special regulation, even after the termination of their function, the former statutory body or former member of the statutory body of the company is obliged to provide reasonable cooperation requested by the court, tax administrator, Social Insurance Agency, health insurance company, administrator, or court executor, to the extent it can be reasonably expected that such cooperation may contribute to clarifying the matters to which the requested cooperation relates. For providing such cooperation, the former statutory body or former member of the statutory body of the company has the right to reimbursement of costs from the company.” (§ 66 (5) of the Commercial Code).*

## ACCOUNTABILITY OF TOP MANAGEMENT

### Liability of former executives for:

- Filing a proposal for the dissolution of the company: The obligation to file a proposal arises if the general meeting was not held in the relevant calendar year or if the company's bodies have not been established for more than three months, in the case of a company that has remained without a sole registered statutory body for a longer period. This obligation falls on the person who last performed the function of the sole statutory body. *"It is reasonable to require this from such a person, especially if their relationship with the company is governed by mandate agreements, so that even after termination of their function, they perform acts*

*in the name of the company preventing potential harm to third parties who have entered into legal relationships with it."* (Explanatory report to the amendment of the Commercial Code No. 264/2017 Coll.).

- Providing reasonable cooperation upon request of the court, tax administrator, Social Insurance Agency, health insurance company, administrator, and court executor.

The former statutory body or former member of the statutory body is obliged to provide cooperation for the period during which they acted as the statutory body or member of the statutory body, but only to the extent that it can be reasonably expected to contribute to clarifying the matters to which the

requested cooperation relates. "In essence, this is part of the obligation to continue acting on behalf of the company and performing acts even after the termination of the authority, with the aim of preventing harm to the company in which they served as a statutory body." (Explanatory report to the amendment of the Commercial Code No. 264/2017 Coll.).

An overview of some sanctions that may be imposed on a member of the statutory body is provided below. This overview is not exhaustive, and the increasing trend in the regulation of these sanctioning mechanisms suggests that in the future, sanctions against members of statutory bodies will only increase and expand.

LAW	BREACH OF DUTY – EXAMPLES	SANCTIONS AGAINST THE COMPANY (RECOURSE)	SANCTIONS AGAINST A MEMBER OF THE STATUTORY BODY
Act No. 7/2005 Coll. on Bankruptcy and Restructuring	Late Filing of a Petition for Declaration of Bankruptcy	N/A	<ul style="list-style-type: none"> <li>A fine of up to €12,500</li> <li>Compensation for damages</li> <li>Exclusion</li> </ul>
	Failure to Provide the Cooperation Requested by the Insolvency Administrator	N/A	<ul style="list-style-type: none"> <li>A fine of up to €165,000</li> <li>Exclusion</li> </ul>
Act No. 530/2003 Coll. on the Commercial Register	Failure to File a Petition for Registration of a Change or Deletion of a Registered Data, Failure to Submit Documents to the Register of Deeds, or Providing False Information	N/A	<b>A fine of up to €3,310</b>
Act No. 69/2018 Coll. on Cybersecurity	Failure to Provide True Information, Failure to Report Changes in Data, or Breach of Obligations Set Forth by Law	<b>A fine ranging from €300 up to 1% of the total annual turnover for the previous financial year, but not exceeding €300,000</b>	<b>A fine ranging from €100 to €5,000</b>
Act No. 289/2016 Coll. on the Implementation of International Sanctions	Violation of a Restriction, Order, or Prohibition Arising from an International Sanction; Failure to Fulfill a Reporting Obligation; Breach of the Duty of Confidentiality; or Infringement of Intellectual Property Rights Protected by a Special Regulation by Transferring Such Rights to Another Person or Granting Consent to Their Use or Exploitation in Violation of an International Sanction or Government Regulation	<b>A fine of €50,000 Up to €132,800</b>	<b>A fine ranging from €109 to €66,400</b>



## ACCOUNTABILITY OF TOP MANAGEMENT

Act No. 297/2008 Coll. on the protection against the legalisation of proceeds of crime and on the protection against the financing of terrorism	Breach of the Duty of Confidentiality under Section 18	N/A	A fine of up to €3,319
Act No. 315/2016 Coll. on the Register of Public Sector Partners	Failure to Fulfil the Registration Obligation, or Providing False or Incomplete Information on the Ultimate Beneficial Owner	A fine ranging from €10,000 to €1,000,000	A fine ranging from €10,000 to €100,000
GDPR / Protection of Personal Data	Failure to Provide Cooperation Violation of Certain Statutory Obligations	A fine of up to 4% of the total worldwide annual turnover for the preceding financial year, whichever amount is higher	A fine of up to €2,000

### LIABILITY UNDER THE LABOUR CODE

This type of liability applies in cases where an employment relationship exists.

Type of liability	Amount of compensation for damage
<b>General liability of an employee for damage</b>	Negligence – up to four times the average monthly wage Intent – actual damage and lost profit
<b>Liability for entrusted assets that the employee is obliged to settle accounts for</b>	Actual damage + lost profit
<b>Liability for the loss of entrusted items</b>	Actual damage + lost profit

- An employee is not liable for damage arising from business risk or for damage caused while averting harm threatening the employer, or danger directly

endangering life or health, provided that the employee did not himself cause that situation and acted in a manner appropriate to the circumstances.

- In the case of joint liability, the compensation shall be determined such that the employees reimburse the employer in proportion to their average earnings, with the earnings of a manager and his deputy counted at double the amount.

### LIABILITY OF MANAGERIAL EMPLOYEES UNDER THE LABOUR CODE

#### Managerial employees

*“Managerial employees of the employer are those employees who, at various levels of the employer’s management, are authorised to assign work tasks to subordinate employees of the employer, to organise, manage and supervise their work, and to issue binding instructions for that purpose.” (§ 9(3) of the Labour Code).*

By judgment of the Supreme Court of the Czech Republic, case file no. 21 Cdo 1863/2003, the above-mentioned definition was expanded and specified such that a

managerial employee may only be one to whom at least one other employee is subordinate by virtue of the employer’s mandate, and who is authorized within that mandate to continuously and regularly assign and impose work tasks, organize, manage, and supervise their work, and issue binding instructions to them. For the definition of a managerial employee, it is therefore not decisive (determinative) how the function (position) is formally designated, or what its status is within the employer relative to other functions (positions); what matters is only whether employees are subordinate to that managerial employee to whom he is authorized to issue binding instructions.

Duties of Managerial Employees:

- to direct and supervise the work of employees
- to create favorable working conditions
- to ensure occupational safety and health protection
- to secure remuneration of employees in accordance with generally binding legal regulations or collective agreements
- to create favorable conditions for raising

## ACCOUNTABILITY OF TOP MANAGEMENT

the professional level of employees and for satisfying their social needs

- to ensure that labor discipline is not violated
- to ensure the timely and effective adoption of measures to protect the employer's property

Joint liability of a managerial employee and a subordinate employee for damage caused to the company.

### INSTRUCTIONS OF A SUPERIOR AND RESPONSIBILITY OF A SUBORDINATE

1. An instruction from a superior generally relieves the subordinate employee of responsibility (with exceptions, e.g., if the action clearly and obviously contradicts the law).
2. Instructions/orders and responsibility apply only to employees of the employer; instructions/orders from another person (e.g., superiors within a group but outside the Slovak employer) are not regulated, and therefore the responsibility arising from such instructions/orders rests with the specific employee (with possibilities of relief under the Labour Code) or their direct superior, who is an authorized employee of the employer.
3. Compensation for damage in cases of holding companies, groups, or other similar structures (group management), where the functional superior is another person not employed by the same employer, is addressed between the employer and the employee according to the Labour Code and the superior who is not an employee of the employer and the one who had to compensate for the damages under civil law regulations.
4. In employment relationships, legal acts on behalf of an employer who is a legal entity are performed only by the statutory

body or a member of the statutory body, or employees authorized by them.

5. Authorized employees are:
  - › Heads of organizational units within the scope of legal acts arising from their functions designated by organizational regulations;
  - › Other employees (of the same employer) authorized in writing within the scope of the specified authorization.
  - › Pursuant to internal organisational regulations, other employees authorised to assign work tasks, organise, manage, and supervise work within the scope of their binding instructions or orders.

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## D&O INSURANCE

### INSURANCE COVERAGE FOR LIABILITY OF COMPANY OFFICERS AND DIRECTORS

1. D&O stands for "Directors and Officers."
2. The purpose of D&O insurance is to protect members of statutory bodies and senior management against liability for damages.
3. The risks faced by these individuals are transferred to the insurance company.
4. The insurer typically provides coverage, within the limits agreed in the insurance contract, for:
  - › financial loss
  - › legal representation costs
  - › investigation costs
  - › fines and penalties
  - › costs related to reputation protection
5. Standard exclusions include intentional misconduct (i.e. deliberate breaches of law are not covered, even though fines and penalties may otherwise be covered).
6. A claim covered under the insurance may typically be brought by:
  - › the company itself
  - › shareholders or partners
  - › employees
  - › supervisory bodies
  - › insolvency trustees
  - › business partners
  - › independent advisors or consultants
  - › other third parties
- A claim is typically brought against the following insured persons:
  - › a member of a company's governing body (e.g. managing director, board)
  - › a procurator (proxy holder)
  - › another insured employee of the company (e.g. a senior executive who is not a member of a governing body)
7. The insurance generally covers liability for breaches of duty committed by insured persons during the insurance period.
8. However, it is possible to agree on a so-called retroactive date, from which the insurer will also cover claims arising from breaches of duty committed by insured persons since that retroactive date (for example, within a period of 5 years prior to the conclusion of the insurance contract).
9. It is also possible to agree on a so-called run-off, i.e. coverage after the termination of the insurance contract. In this case, insured persons will be covered for breaches of duty committed during the term of the insurance, even if the claims are brought only after the contract has expired
10. Nevertheless, the most appropriate approach is to maintain D&O insurance in effect for the entire existence of the company.

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