

Is Beneficial Ownership Register Act compliance an insolvency administrator's duty?

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Main obligations under BORA

Who must report the beneficial owner?

Obligations of an insolvency administrator

Before the most recent update to the online FAQ section by the responsible authority, the answer to this question was unknown. Due to the tight timeframes for complying with the Beneficial Ownership Register Act (BORA) and the range of practical problems arising from it, the question has caused headaches for insolvency law practitioners in Austria. In order to explain the issue, a brief summary of BORA is necessary.

Main obligations under BORA

BORA implements the fourth EU Anti-money Laundering Directive⁽¹⁾ and came into force on 15 January 2018. It stipulates that legal entities (the scope of application refers to all widely used legal forms) must identify and check the identities of their beneficial owners (Section 3). In order to simplify compliance with this obligation, the legal and beneficial owners must send the necessary documents and information to the legal entities (Section 4).

The reports containing the data about the beneficial owners must be submitted through an online register via the one-stop shop Business Service Portal by the legal entities themselves or the legal professionals representing them. Considering that reports through legal professionals were not possible before 2 May 2018, the official deadline (1 June 2018) for complying with BORA obligations was less than a month. As a result, the deadline was postponed twice – first to 15 June and then to 15 August 2018.

Who must report the beneficial owner?

BORA imposes the obligation to report the beneficial owner on the legal entities themselves (Section 5). Following the general rule that the legal entities can take action and assume obligations only through their representative organs (ie, statutory bodies), the obligation to report will usually fall to the director or management of the legal entity.

When it comes to reporting the beneficial owner in the course of insolvency proceedings, this scarce regulation leaves many questions unanswered:

- Is a formally dissolved company (due to the opening of an insolvency or liquidation procedure) still obligated to report its beneficial owner?
- Does BORA distinguish between different types of insolvency proceedings (eg, restructuring proceedings with or without self-administration)? If so, at what moment does the obligation to report pass from the management to the insolvency administrator?
- Even if the obligations under BORA do not fall to the insolvency administrator, what is to be done where the management or the operating body of the insolvent legal entity does not exist or the beneficial owner cannot be identified?

Since BORA does not refer to any of these questions – and imposes fines of up to €200,000 in cases

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of non-compliance – there was a lot of commotion among legal practitioners. Besides these insolvency-related problems, there were even more unanswered questions regarding the process of identifying the beneficial owner itself. Data protection was another significant issue. To address some of these, the Ministry of Finance announced a decree with its first legal opinion on BORA by the end of the first quarter of 2018.

Obligations of an insolvency administrator

The first reference to insolvency proceedings in the context of BORA arrived to much anticipation in the aforementioned decree on 27 April 2018. While this solved the problem of identifying the beneficial owner of an insolvent company, it did not mention who bears the obligation to report.

It clarified that in cases where the legal ownership corresponds to the beneficial ownership, no changes are to take place by an opening of insolvency proceedings. If the beneficial owner still cannot be identified after all possibilities have been exhausted, the rules regarding identifying the subsidiary beneficial ownership will apply. In this case, the top management level (ie, statutory body, depending on the legal form of the entity) shall be reported as a subsidiary beneficial owner. If this no longer exists, the insolvency administrator is to be reported as the subsidiary beneficial owner.

Further insight was offered by an update to the BORA authority's online FAQ section at the end of July 2018. Provided that the entity is not struck from the public registry, the BORA obligations will remain intact. Following the legal opinion of the Ministry of Finance, if the beneficial owner cannot be identified and no director was appointed, the insolvency administrator is to be reported as a subsidiary beneficial owner. In such a case, the public register (ie, the company register) will automatically show the insolvency administrator as the beneficial owner.

In liquidation proceedings, the obligation to report the beneficial owner falls to the liquidator, while in the insolvency proceedings (be it a restructuring with or without self-administration or bankruptcy proceedings) this obligation does not apply to the insolvency administrator – even in cases where the management has ceased to exist. This interpretation is a consequence of Section 83 of the Insolvency Code, which sets out the scope of the insolvency administrator's responsibility and obligations. Since the obligation to report does not affect the insolvency estate, the insolvency administrator is not entitled to report the beneficial owner. The legal gap in cases where the management has ceased to exist remains to be closed by the financial authority applying the law. In the meantime, insolvency administrators will have to be satisfied with the fact that the BORA authority interprets financial fines as claims which are excluded from the insolvency proceedings according to Section 58 of the Insolvency Code.

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Endnotes

(1) EU Directive 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending EU Regulation 648/2012 and repealing EU Directive 2005/60/EC and Commission Directive 2006/70/EC (text with EEA relevance).

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