Insolvency & Restructuring - Austria

Liability of *de facto* managing director for delay in filing for insolvency

Contributed by **Graf & Pitkowitz**

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If an insolvency petition is filed too late and creditors incur damage because of it, the responsible managing director may be held liable. However, in practice, companies are often actually managed by a different person. In such cases, the *de facto* managing director may be held liable.

De facto managing director

According to law, any person who appears to manage a company in both internal and external relations – without having actually been appointed as managing director – is considered a *de facto* managing director. This may happen due to an ineffective appointment or if the appointed managing director acts only as a 'straw man' or shadow director. The most important feature of a *de facto* managing director is that he or she displaces the previously appointed managing director by either directly performing management tasks or exherting a controlling influence on the management of the company.Controlling influence may be exercised through binding instructions or factual influence.Usually, a majority shareholder actually manages business transactions; however, a non-shareholder may also act as a *de facto* managing director.

The level at which *de facto* management and thus tortious co-liability is to be assumed is unclear. This is unproblematic for a shareholder that is managing a company single-handedly, using the managing director only as a 'straw man'. However, if it is unclear exactly who is managing the company or frequent instructions are being issued, liability is not easy to substantiate.

Liability for delay in filing for insolvency

Although *de facto* managing directors cannot formally file insolvency petitions, liability due to a delay in filing for insolvency is still possible, because if they actually manage the company, they must exert active influence in the case of insolvency. If a *de facto* managing director fails to meet this obligation, he or she is liable to creditors.(1)

On the one hand, so-called 'proportional damage' may be claimed. This is the difference between the actual insolvency dividend and the hypothetical dividend that would have been paid had insolvency proceedings been opened in due time. However, if a claim arises after the company has become insolvent, creditors may also seek to claim so-called 'damage to confidence'. In this case, creditors must be put in the position that they would have been in had they not contracted with the debtor. However, the profit and fixed-cost contribution included in the price need not be reimbursed.

Comment

Although many aspects are still unclear with regard to the liability of *de facto* managing directors, this principle plays an important role in insolvency proceedings. If liability claims are asserted because of a delay in filing for insolvency, creditors should not only keep an eye on the formal business director, but also consider the possibility of the presence of a *de facto* managing director, where applicable.

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Endnotes

(1) Cf RS0123113 – in particular, Supreme Court 8 Ob 124/07d.

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