

Potential liability of chartered accountants for delaying insolvency proceedings



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August 12 2016

Insolvency & Restructuring, Austria

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Chartered accountants entrusted to draw up financial statements must also examine the company's status of overindebtedness in terms of insolvency law if its accounts show that it is overloaded with debt.

However, in practice, this task is often neglected, as the fact that chartered accountants run the risk of being held liable for damage incurred due to delaying insolvency proceedings is often ignored.

Chartered accountants' obligation to comment on overindebtedness

If a company's accounts show that it is overloaded with debt, its equity must be recognised as negative equity. In addition, the notes to the company's financial statements must explain whether the company is simultaneously overindebted pursuant to Austrian insolvency law. This in turn requires an audit of its debt overload, which includes, among other things, a review of whether there are positive prospects for the company's survival. If the company is not overindebted, the reasons for that conclusion must be explained in the notes. If the company is in fact overindebted, its competent officers must file for insolvency immediately.

However, common practice shows that the financial statements of companies with negative equity do not contain corresponding disclosures or only insufficient disclosures in relation to the company's overindebtedness. As such, it appears that neither company representatives nor chartered accountants entrusted with drawing up financial statements have sufficiently addressed the question of overindebtedness.

The going concern principle requires chartered accountants to examine whether the company is insolvent if its accounts show that it is overloaded with debt. This obligation exists even if the chartered accountants are entrusted only with drawing up the financial statements and have no mandate to examine whether the company is overindebted. In these cases, they must explicitly inform the company and its officers, as appropriate, that a thorough review of the company's debt status is required (using corresponding expert opinions, if necessary).

Liability of chartered accountants

If the chartered accountant who drew up the financial statements culpably breaches his or her obligation

to examine whether the company is overindebted, he or she runs the risk of being subject to liability. Although the Austrian courts have not yet ruled on this question, legal scholars nevertheless argue that chartered accountants are liable for damage arising from any culpable delay in initiating insolvency proceedings, because the accountant erred in or failed to examine the company's accounts and whether its level of debt qualified as overindebtedness.

The chartered accountant responsible for drawing up the financial statements is directly liable towards the company and the insolvency estate. In this context, compensation can be sought for the damage suffered by the company due to a delay in opening insolvency proceedings. This damage is established by comparing the company's assets at the time of the actual (delayed) application and the time of a timely application. Further, compensation for various other forms of damage may be enforced. Apart from being liable to the company and insolvency estate, as appropriate, the chartered accountant may also be liable to the company's officers and, in certain cases, to certain shareholders.

However, the chartered accountant who drew up the financial statements is not liable to the company's creditors under any circumstances. Further, pursuant to the General Terms of Engagement of the Austrian Chamber of Public Accountants, claims for compensation enforced against accountants are subject to a truncated limitation period of six months (rather than three years).

Comment

Although accountants' liability has not been concretely established (in the absence of corresponding case law), the risk of liability must not be ignored. If the level of debt in a company's accounts suggests overindebtedness, the accountant should:

- examine in greater detail whether the company is overindebted pursuant to insolvency law, even if this is not explicitly part of his or her mandate; and
- explicitly inform the company (or its officers, as appropriate) that a more detailed review is necessary.

From the perspective of liability, incorporating ill-considered statements regarding the company's status of overindebtedness in the notes is strongly inadvisable, as this could result in compensation claims for damages.

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