INSOLVENCY & RESTRUCTURING - AUSTRIA

Potential obligation of majority shareholder to file for insolvency

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Introduction

Recent changes to the Insolvency Code have considerably expanded the obligations of shareholders in insolvency situations. For example, a new obligation has been introduced which requires majority shareholders in so-called 'companies without management' to file for insolvency. This obligation must normally be discharged by the company's officers (eg, managing directors and managing boards), who must immediately file for insolvency according to the Insolvency Code if the company is unable to pay its debts or overindebted in order to prevent further damage to creditors. Under the new provisions, the obligation to file for insolvency will be transferred to the majority shareholder if the insolvent entity has no officers and is therefore 'without management'. If this obligation is breached, the majority shareholder faces a threat of liability toward the creditors.

The language of these new provisions remains vague and provides significant flexibility in interpretation, which inevitably results in a number of legal uncertainties. However, in the absence of any Supreme Court case law, these questions cannot be fully resolved.

Affected companies

In any case, the majority shareholder of a limited liability company without management must file for insolvency. Further, based on the legislative text, the following may be subject to this obligation:

- the majority shareholder of a stock corporation;
- the limited partner of a limited liability partnership; and
- the majority shareholders of a *societas Europaea*.

Further, some believe that the new provisions will apply to associations and cooperative societies. However, there is strong evidence that only majority shareholders in limited liability companies without management, not the other types of entity, must file for insolvency. However, in the absence of any case law, this cannot be safely assumed. Caution should therefore be exercised by all of these companies.

Companies without management

The question of when a company is considered to be without management was not finally resolved. In any event, this is the case if all of the officers have been removed, stepped down, died or become legally incompetent. A company may be considered to be without management if it *de facto* has no

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representatives. Formally speaking, these are cases in which a validly appointed representative still exists, who *de facto* no longer represents the company (eg, because he or she disappeared or refuses to discharge his or her obligations).

These cases tend to be subject to more restrictive interpretation, which is why only the majority shareholder of an formally unrepresented company must file for insolvency. The fact that the company is merely *de facto* without management is insufficient for such an obligation. Again, in the absence of confirmatory case law, caution should be exercised.

Majority shareholders

Any shareholder holding more than 50% of the capital of a company without management – exclusively the shareholding, not voting rights – is a majority shareholder and therefore obliged to file for insolvency. However, the extent to which the new provisions will cover fiduciary or group scenarios remains unclear.

At least in the case of fiduciary relationships, the law is reasonably sound, albeit not confirmed by case law. According to the law, a fiduciary agent who formally holds more than 50% of the capital of a company without management (whether in his or her own name or in the name of others) must file for insolvency, where necessary. On the other hand, the grantor has no such obligation, because he or she is only indirectly connected to the company.

The question of how this new obligation affects a group scenario is still largely unsettled. There may be scenarios in which a shareholder does not hold 50% of a company without management directly, but qualifies as a majority shareholder on a direct and indirect basis – for example, via a wholly owned subsidiary. It is still unclear whether these indirect shareholdings should be taken into account in this context.

Consequences for breach

If a majority shareholder breaches his or her obligation to file for insolvency, he or she may be held liable by the creditors. He or she will then be liable for any damage suffered by creditors due to the delayed application for insolvency. As a matter of principle, creditors' insolvency recovery rates will be affected, and the damage they have suffered due to the delayed application will be quantified. However, the majority shareholder will not be liable to the company itself.

Majority shareholders' power in insolvency proceedings

A recent judgment (although not by the Supreme Court) ruled that a majority shareholder can represent the company in connection with the opening of insolvency proceedings. This is the stage between making the application and the date on which the decision to open insolvency proceedings becomes final (usually only a few days). However, the majority shareholder faces no significant limitations, because insolvency proceedings will regularly be opened immediately after an application has been made by the company itself. This power of representation will expire once the decision initiating proceedings becomes final.

Interim managing director as possible alternative?

According to Austrian company law, a request may be made to the court to appoint an interim managing director for a limited liability company or a company limited by shares in urgent cases. This is the only means by which a shareholder can escape his or her obligation, if any, to make an application for insolvency. The decisive factor is the date of appointment of the interim managing director. If he or she is appointed by the court before the company is insolvent (ie, before it is unable to pay or overindebted), the interim managing director, and not the majority shareholder, must file for insolvency and assume liability, if any. However, the mere fact that an application is made does not release the majority shareholder from its obligation. Further, it will not always be practical to appoint an interim managing director – for example, no one may be willing to take the position.

Comment

Although an insolvent company with no management is rare in practice, this situation may arise. Further, companies without management may be actively engaged in business (eg, under continuing contracts) and therefore generate risks of liability for the majority shareholder on a continuous basis. Thus, it is strongly recommended that majority shareholders of companies without management examine their company's economic situation on a continuous basis in terms of whether it might be overindebted or unable to pay its debts. As there is significant flexibility in the interpretation of the new provisions, in case of doubts, majority shareholders should act sooner, rather than later.

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