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Guarantor's Obligations of Corporate Management[2]

Obowiązki gwaranta w zakresie zarządu przedsiębiorstwem

Concerning criminal liability for omissions, § 2 StGB[3] gives reason for much scientific discussion. In this field of wrongdoing by omission, in addition to the elements of the active commission of a criminal offence, the requirements of § 2 StGB must be fulfilled in order to trigger criminal liability. § 2 StGB is only applicable to criminal offenses which require the occurrence of a certain result. Two preconditions need to be met, namely a „Legal Obligation to avert the result that concerns the offender in particular", the so-called guarantor's obligation, and an equivalence of the omission with active doing. Thus, the guarantor's obligation in § 2 StGB concerns only a restricted circle of perpetrators who:

a) have a duty to prevent the result due to contract,
b) previous endangering behavior or
c) statutory law.

In business practice, the question whether the decision-maker of a company has a guarantor's obligation to prevent a certain criminal result from occurring is of particular relevance. In addition to employee

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[3] BGBl. Nr. 60/1974. „StGB" is an abbreviation for the „Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen" (Austrian Criminal Code).

and customer protection duties, companies also monitor obligations for dangers emanating from products or actions of employees, etc.

In the following, based on a specific case which was decided by the Austrian Supreme Court in 2015[4], the question will be examined whether, or under what conditions, decision-makers of a company have a guarantor's obligation to prevent third parties, such as (new) business partners, from damage.

In the mentioned case, a company had serious financial problems and was almost insolvent. The managing director knew about the company's liquidity problems but did not prohibit his employees (who knew nothing of the financial situation) from placing further orders for the company. He also did not inform the business partners about the company's liquidity problems. As a result, the business partners suffered a financial loss because the company could not pay its bills. The managing director was charged with contribution by omission (to fraud).

Unfortunately, the Supreme Court did not comment in detail on the issue of omission or the possible basis of a guarantor's obligation. The judgment was only reversed and the case referred to the court of first instance for a new trial. Therefore, the following considerations should be made.

1. Guarantor's obligations due to contract

First, a guarantor's obligations (to protect the assets of business partners) based on the contract is to be examined. In the aforementioned case, the concluded contracts for services and the purchase of goods did not stipulate any explicit obligation to inform the other contracting party about prospective insolvency or to protect them against a financial loss. Even an implied obligation to inform about such circumstances cannot be assumed.

However, with the conclusion of a contract, not only primary duties but also pre-contractual[5] and secondary obligations arise. In the case in

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[4] Judgment of the Supreme Court from the 11.06.2015, 12 Os 121/14g; M. Braun, C. Kahl, *Beitrag*..., p. 170.

[5] For the differentiation of pre-contractual obligations between duties of protection, due diligence, and information, see, for example, the judgment of the Supreme Court from the 28.11.2012, 4 Ob 141/12g and from the 14.11.2012, 7 Ob 157/12g; RIS-Justiz RS0053208.

question, especially pre-contractual obligations to protect and inform the business partners about relevant information concerning the conclusion of the contract (*culpa in contrahendo*) should be examined.

According to the prevailing opinion[6], even if a contract contains a stipulated obligation to inform about essential circumstances, it does not automatically result in a parallel guarantor's obligation in criminal law. This distinction is justified by the fact that otherwise, any simple breach of contract could trigger criminal liability. The contracting party with a better negotiating position could shift its typical contract risks to the other contracting party[7]. Such an agreement would also be „contra bonos mores" according to civil law (which, however, is not relevant for the existence of a guarantor's obligations). It would worsen the tense financial situation (essentially like a self-fulfilling prophecy) if a contracting party with financial issues always had to inform its business partners about all economic problems of the company. The consequence would be that many business partners would either not conclude the contract at all, or under harsh conditions only (which would aggravate the predicament).

Therefore, there is a legitimate interest in concealing the economic crisis, which has to be balanced with the interests of the other contracting parties. This restriction of the obligation to inform the business partners is (a maiore ad minus) even more important for pre-contractual obligations.

Hence, a guarantor's obligation cannot be derived from pre-contractual information obligations alone. Rather, a special relationship of trust between the contracting parties is required in order to deduce guarantor's obligations from pre-contractual obligations to inform about circumstances that could affect the business partners' financial sphere (like risk of insolvency, as in the mentioned case)[8].

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6 Judgment of the Supreme Court from the 20.07.2010, 14 Os 89/10k and from the 17.02.2004, 14 Os 10/04; R. Kert, in: *Salzburger*..., § 146 nr. 118.

7 R. Kert, in: *Salzburger*..., § 263 nr. 22.

8 D. Kienapfel, K. Schmoller, *Strafrecht*..., § 146 Nr. 89; R. Kert, in: *Salzburger*..., § 146 nr. 115 and 118; K. Kirchbacher, A. Sadoghi, in: *Wiener*..., § 146 nr. 26; O. Leukauf, H. Steininger, M. Flora, *Strafgesetzbuch*..., § 146 nr. 21; judgment of the Supreme Court from the 22.10.1986, 9 Os 114/86; for Germany: W. Perron, in: *Strafgesetzbuch*..., § 263 nr. 22, who explicitly emphasizes that pre-contractual obligations can (also) establish a special relationship of trust; BGHSt 39, 392/399; OLG Hamm 08.02.2006, 13 U 165/05; BGH NStZ 2010, 502 f.

According to the prevailing opinion, such a special relationship of trust is based on the duration and intensity of the business relationship[9]. If contracts are only concluded occasionally over a longer period of time (or even one time only), a special relationship of trust can hardly be assumed. A long-standing close business relationship with frequent contracts, however, strongly indicates such a relationship of trust. In the case of a shorter and less intensive business contact, a special relationship of trust can also be based on kinship or friendship[10].

In summary, only if such an intensive business relationship existed in the present case, the managing director had, based on a contractual position of a guarantor, an obligation to prevent the contractual partner from the financial loss.

Unfortunately, in the case in question, the judgment only stated in general terms that contracts for the supply of goods and the provision of services were concluded (with a total number of 303 companies). However, no further details (as to the type of contracts, the duration or intensity of said contracts, or possible personal connections) were mentioned. Therefore, it cannot be conclusively answered whether in this case there was a special relationship of trust (and whether the managing director had guarantor's obligations based on (pre-) contractual obligations).

2. Guarantor's obligations due to endangering behavior

If a guarantor's obligation cannot be based on contract, it might be possible to base it on previous endangering behavior, especially if the duty to act is not limited to close business contacts. In the case in question, previous endangering behavior of the managing director could be:

a) running a business per se,
b) inducing insolvency due to adverse economic dispositions,
c) authorizing the employees to place orders independently, or
d) neglecting to prevent employees from placing further orders.

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9 R. Kert, in: *Salzburger*..., § 146 nr. 118 ff; compare O. Leukauf, H. Steininger, M. Flora, *Strafgesetzbuch*..., § 146 nr. 21.

10 W. Perron, in: *Strafgesetzbuch*..., § 263 nr. 22.

2.1. Guarantor's obligations of the managing director due to running a business

First, the fundamental question arises, which requirements, in particular regarding "objective negligence", should be established concerning the endangering behavior.

For part of the legal doctrine and the prevailing case-law[11], a guarantor's obligation can be derived even from objectively diligent (i.e. normatively permitted but possibly empirically risky)[12] behavior. According to another opinion[13], however, objectively negligent behavior is required.

In my opinion, for criminal liability for omissions based on endangering behavior, it is not necessary that the active conduct must be objectively negligent. Only the omission itself has to be objectively negligent. If an endangering behavior is assessed to be objectively diligent, then this assessment is only valid as long as the circumstances do not change; a behavior is therefore objectively diligent only under the condition of unchanging circumstances. If the circumstances change after the realization of endangering behavior and risk-increasing circumstances occur, the person who created the danger must have an obligation to prevent the risk from being realized. Insofar as the endangering behavior is objectively negligent, this indicates the objective negligence of omission.

However, a minimum requirement for the endangering behavior must be, in a sense of a coarse filter, that the infringement of legally protected rights is objectively foreseeable at the time when risk is created. Thus, it has to be a close, adequate risk.

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[11] Judgment of the Supreme Court from the 07.01.1960, 9 Os 166/59 = SSt 31/1; 20.04.1967, 11 Os 195/66 = SSt 38/31; 24.08.1976, 10 Os 49/76 = SSt 47/42 = ZVR 1977/46; 14.03.1983, 11 Os 23/83 = SSt 54/21; O. Leukauf, H. Steininger, M. Stricker, in: *Strafgesetzbuch*..., § 2 nr. 24; E. Fabrizy, *Strafgesetzbuch*..., § 2 nr. 3, 5 and 6; C. Mayerhofer, *Strafgesetzbuch*..., § 2 E 21; H. Steininger, *Die moderne*..., p. 371; G. Jakobs, *Strafrecht*..., p. 29–39 ff; for Germany for example: H. Jescheck, T. Weigend, *Strafrecht*..., p. 625; U. Stein, *Systematischer*..., § 13 nr. 38 ff and 41; C. Roxin, *Strafrecht*..., § 32 nr. 156 ff.

[12] E. Steininger, in: *Salzburger*..., § 2 nr. 83.

[13] OLG Wien ZVR 1992/29; F. Nowakowski, in: *Wiener*..., § 2 nr. 27; D. Kienapfel, F. Höpfel, R. Kert, in: *Strafrecht*..., p. 226; E. Steininger, in: *Salzburger*..., § 2 nr. 84; in the result also O. Triffterer, *Strafrecht*..., chapter 14 nr. 50 ff; H. Fuchs, I. Zerbes, *Strafrecht*..., chapter 37 nr. 61; for Germany: N. Bosch, in: *Strafgesetzbuch*..., § 13 nr. 35 ff with further evidence; BGH StV 1998, 125; BGHSt 37, 106.

For the discussed case, this means that merely running a business is not socially inadequate[14] because the behavior is normatively approved. In addition, the financial loss of business partners is not objectively foreseeable (if no payment problems have yet occurred)[15] because there is no close, adequate risk of damage to the creditors. The infringement of legally protected rights may be objectively foreseeable when the first signs of payment difficulties arise, but not prior to that moment. Therefore, running a business in itself cannot lead to a guarantor's obligations due to endangering behavior.

2.2. Guarantor's obligations of the managing director due to inducing insolvency based on adverse economic dispositions for the company

Alternatively, the disadvantageous economic dispositions (by the managing director) causing the insolvency may also constitute an endangering behavior.

Financial dispositions by the managing director could be deemed socially inadequate if the decisions made are economically so risky that they are no longer within the usual economic risk range for the specific business sector. Therefore, the so-called „Business Judgment Rule" can be used as a standard of due diligence. The Business Judgment Rule (explicitly enshrined in law in 2015)[16] states that the managing director has to conduct business with the diligence of a proper businessperson. Thus, a managing director acts with the diligence of a reasonable business owner if he is not guided by interests that are not on behalf of the company and if he can, on the basis of reasonable information, assume that his actions are in the best interest to the company.

If, in the case in question, the managing director acted in violation of due diligence, the endangering behavior (inducing insolvency) is socially inadequate.

Only regarding already existing business partners, the infringement of legally protected rights would also be objectively foreseeable and, therefore, the behavior of the managing director would be objectively

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14 Though social inequality is not a precondition for danger-inducing pre-behavior, it has an indicative effect on the social inadequacy of omission and is thus of importance.

15 Concerning the induction of insolvency, see below 2.2.

16 BGBl I 2015/112.

negligent (which also indicates the objective negligence of subsequent omission)[17].

However, if the managing director has „only" induced insolvency based on adverse economic dispositions, without authorizing the employees to place orders independently[18], the damage to the future business partners is not yet objectively foreseeable because there is no close, adequate risk of infringing the legally protected rights of the future business partners. Thus, the managing director has no guarantor's obligations to prevent future business partners from damage.

2.3. Guarantor's obligations of the managing director due to authorizing the employees to place orders independently

Assuming that the managing director did not directly instruct employees to place the damaging orders[19], but at an earlier point in time instructed employees to place orders independently, it must be examined whether this initiating instruction could be an endangering behavior.

Before the period when the first financial problems appear, the instruction to the employees is not objectively negligent. Therefore, in this scenario, the managing director has no guarantor's obligations[20].

At the latest with the actual occurrence of insolvency, however, it is objectively foreseeable that the authorization of employees to place orders independently may lead to an infringement of legally protected rights of the business partners[21]. Generally, the damage to the business partners will be objectively foreseeable even at an earlier point in time before the insolvency actually occurs, if the insolvency of the company

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17 Even if the managing director acted socially adequate and nevertheless insolvency occurred, the damage to the current business partners would be objectively foreseeable. Therefore, even in this case, the managing director would have a guarantor's position. However, after the termination of the endangering behavior, additional risk-increasing circumstances would be required in order to qualify the failure to prevent damage to the business partners as socially inadequate (causing criminal liability for the omission). Such risk-increasing circumstances could be, in particular, that the managing director suddenly finds out that employees have (surprisingly) concluded new contracts with the business partners.

18 See below, subchapter 2.3.

19 Otherwise, an active commission of a criminal offence would be assumed.

20 Compare subchapter 2.1.

21 An exception might be made if an extremely promising remediation attempt is made within the reorganization period. Normally, however, it can be foreseen (ex ante) that the business partners may be harmed (even) in the case of a restructuring attempt.

is already very likely to happen due to the bad economic situation. If the managing director authorizes the employees to place orders independently after this point in time, he or she creates the necessary close, adequate risk of damaging future business partners.

It should be noted, however, that when the managing director instructs the employees to place orders at the time of insolvency (or shortly before), he usually acts with the intent to mislead and damage the business partners. In this case, a criminal offense by active doing (instructing the employees to place further orders) would have to be assumed.

Criminal liability for omission would only be possible, however, if, at the time of the instruction, the insolvency is to be expected (objectively) or had already occurred, but the managing director knows nothing about the precarious financial situation. In this scenario, it would be objectively foreseeable that the instruction could lead to damaging the business partners, but the managing director would have no intent to do so at the time when this instruction was issued. In this case, therefore, the managing director would be a guarantor for preventing business partners from damage based on endangering behavior (instructing the employees to place orders independently).

However, it remains to be examined whether the directive of the managing director itself was already socially inadequate, or risk-increasing circumstances subsequently occurred, which increased the created risk to such an extent that it was no longer normatively approved.

Since no risk-increasing circumstances have occurred after the endangering behavior, the endangering behavior itself must have been socially inadequate for a criminal liability for omission. Authorization to place orders independently prior to insolvency is generally socially adequate. After that moment, and even just before, if the insolvency of the company is already very likely to happen, such authorization is socially inadequate. Although in the restructuring process as well as shortly before the occurrence of insolvency a few conclusions of contracts may be (and have to be) compatible with the due diligence of a conscientious businessperson[22], this cannot apply to a general authorization of the employees to place orders with no restraint.

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[22] Concerning conclusions of contracts in the restructuring process see J. Reich-Rohrwig, in: *Wiener*..., § 25 nr. 123 ff with further evidence.

Therefore, it must be stated that in the case in question a guarantor's obligations based on endangering behavior due to authorizing the employees to place orders independently would only be conceivable if either the insolvency of the company had already occurred or is imminent (due to the bad economic situation). The prerequisite is that the managing director (negligently) does not have the knowledge about the situation.

2.4. Guarantor's obligations of the managing director due to the failure to prevent employees from placing further orders

Alternatively, the failure to prevent employees from placing further orders could be a previous endangering behavior of the managing director that leads to a position of a guarantor. In this case, the punishable omission would be not informing the business partners about the risks, or the failure to offer the dissolution of the concluded contract. However, this cannot be qualified as a previous endangering behavior because if the managing director has an obligation to prevent the orders (for example, due to a contract in case of a special relationship of trust), there is no need to discuss a guarantor's obligation due to previous endangering behavior. In that case, the offence of fraud by omission would already be completed. If, on the other hand, the managing director has no obligation to prevent employees from placing the orders, this cannot be qualified as an omission (and hence as previous endangering behavior) because otherwise, any omission of any person could trigger guarantor's obligations to protect the business partners.

3. Guarantor's obligations by statutory law

Finally, if a guarantor's obligations cannot be derived from the concluded contracts or an endangering behavior, it has to be examined whether a guarantor's position as the managing partner could be based on statutory law. For this purpose, the following distinction between conclusions of the contracts has to be made:

a) before the occurrence of insolvency,
b) after the occurrence of insolvency but within the rehabilitation procedure,
c) after the end of rehabilitation procedure.

3.1. Conclusion of the contracts before the occurrence of insolvency

Before the occurrence of illiquidity, a guarantor's obligations of the managing director could be derived from the Business Judgment Rule (e.g., for limited liability companies 25 Abs 1a GmbHG)[23].

In order to determine whether, or to what extent, a guarantor's obligations can be based on the Business Judgment Rule, the protective purpose of § 25 (1a) GmbHG must be examined[24]. The object of the Business Judgment Rule, however, is not to protect creditors from financial loss but rather to preserve and safeguard the company's assets[25]. Therefore, it can be assumed that this is not a protective provision for the benefit of the business partners. Since there are no other statutory provisions imposing obligations on the managing director to prevent business partners from damage prior to the insolvency, there is no position of a guarantor based on statutory law prior to the insolvency.

3.2. Conclusion of the contracts after the occurrence of insolvency but within the rehabilitation procedure

After the insolvency occurred, the position of a guarantor could be derived from the Insolvency Code, in particular from the obligation to file for insolvency pursuant to § 69 IO[26]. Therefore, it must be distinguished whether the contract with the respective business partner was concluded within the rehabilitation procedure or afterwards.

During a rehabilitation procedure, an insolvent company has the possibility to restructure and continue running the insolvent company.

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[23] „GmbHG" is an abbreviation for the Austrian statute governing companies with limited liability.

[24] Judgment of the Supreme Court from the 14.03.1983, 11 Os 23/83, SSt 54/21; F. Nowakowski, in: *Wiener*…, § 2 nr. 8 f; O. Leukauf, H. Steininger, M. Stricker, in: *Strafgesetzbuch*…, § 2 nr. 28; E. Fabrizy, *Strafgesetzbuch*…, § 2 nr. 3; D. Kienapfel, *Die Garantenpflichten*…, p. 18 f, 21, 22 and 83; H. Steininger, *Die moderne*…, p. 371; U. Medigovic, *Unterlassung*…, p. 423 f; M. Hilf, in: *Wiener*…, § 2 nr. 75 and 84.

[25] S. Kalss, in: *Österreichisches*…, nr. 3/408. To the guardianship position of an organ of a legal person (such as a managing director, board member or supervisory board member) to protect the legal assets of the company based on its position H. Fuchs, I. Zerbes, *Strafrecht*…, chapter 37 nr. 49; E. Steininger, in: *Salzburger*…, § 2 nr. 54 f; K. Kühl, *Strafrecht*…, § 18 nr. 78 with further evidence; M. Hilf, in: *Wiener*…, § 2 nr. 89.

[26] „IO" is an abbreviation for the „Bundesgesetz über das Insolvenzverfahren" (Austrian Insolvency Code), BGBl. I Nr. 114/1997.

For the reorganization, the company has a period of 60 days (in exceptional cases 120 days). Prerequisites for the rehabilitation process are a realistic chance of rehabilitation and a diligent rehabilitation effort[27].

According to the prevailing opinion, during the rehabilitation procedure, new contracts may also be concluded if the rehabilitation attempt appears promising and feasible[28] (with due care)[29]. In case the rehabilitation attempt fails, the managing director is (in principle) not liable for any damage to the assets of the creditors[30]. If the conclusion of such new contracts is necessary for continuing the company, their conclusion is, of course, compatible with the diligence of a proper and conscientious businessperson[31].

Accordingly, even after the insolvency of the company, the conclusion of a contract with a business partner does not automatically constitute the position of a guarantor under the provisions of statutory law for the managing director.

3.3. Conclusion of the contracts after the end of rehabilitation procedure

Insofar as the prerequisites for the restructuring process have not been fulfilled, e.g. because the rehabilitation period has expired or a reorganization does not appear to be promising or feasible, the opening of insolvency proceedings must be requested. A breach of the obligation to file for insolvency constitutes a breach of the duties imposed on the managing director by § 69 IO.

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27 J. Reich-Rohrwig, in: *Wiener*..., § 25 nr. 114; M. Dellinger, in: *Insolvenzgesetze*..., § 69 KO Nr. 2 and 12 f; H.G. Koppensteiner, F. Rüffler, *Gesetz*..., § 25 GmbHG nr. 35 and 37.

28 Judgment of the Supreme Court from the 17.11.1987, 3 Ob 520/86, SZ 60/244; 09.02.1988, 6 Ob 508/86, SZ 61/26.

29 Judgment of the Supreme Court from the 10.12.1990, 15 Os 120/90 and from the 23.11.1989, 12 Os 124/89; H. Honsell, *Die Haftung*..., p. 140 f; J. Reich-Rohrwig, *GmbH-Recht*..., nr. 2/380; J. Reich-Rohrwig, in: *Wiener*..., § 25 nr. 123 and 126; M. Dellinger, in: *Insolvenzgesetze*..., § 69 KO nr. 26 with reference to G. Roth, *Haftungsbeschränkung*..., p. 6.

30 Judgment of the Supreme Court from the 10.12.1990, 15 Os 120/90; also judgment of the Supreme Court from the 02.07.1985, 5 Ob 603/84, SZ 58/115, and from 07.04.1987, 2 Ob 625/86; BGH NJW 1979, 1823 = BGHZ 75, 96; J. Reich-Rohrwig, in: *Wiener*..., § 25 nr. 126 with further evidence; J. Reich-Rohrwig, C. Grossmayer, K. Grossmayer, A. Zimmermann, in: *Kommentar*..., § 84 nr. 740.

31 J. Reich-Rohrwig, in: *Wiener*..., § 25 nr. 311 with further evidence.

According to the prevailing opinion[32], § 69 IO is a protective provision for the benefit of the creditors. The protective purpose of the norm is to keep the insolvent company away from business transactions in order to prevent endangerment or damage to the creditors[33]. Since § 69 IO aims precisely at the protection of the creditors, it states, in my opinion, a personal obligation of the managing director to prevent damage to the business partners.

Therefore, in case of a conclusion of a contract with business partners after violating the obligation to file for insolvency, the managing director has position of a guarantor to prevent damage to the business partners.

4. Conclusion

In summary, in the discussed case, the managing director has a guarantor's obligations to prevent business partners from damage only under the following conditions.

For the managing director position of a guarantor can be based on a contract if an intensive long-lasting business relationship or a personal connection between the business partners due to kinship or close friendship existed. If such a special relationship of trust existed, a guarantor's obligations of the managing director arise at the beginning of the precontractual obligations.

Alternatively, if, for example, no special relationship of trust existed, position of a guarantor can be derived based on endangering behavior

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32 J. Reich-Rohrwig, in: *Wiener*..., § 25 nr. 319/3; BGHZ 164, 50, 60 f; BGH II ZR 130/10, ZIP 2012, 1455 nr. 22 with further evidence.

33 Judgment of the Supreme Court from the 22.10.1997, 7 Ob 2339/96 p, SZ 70/215; 20.3.2007, 4 Ob 31/07y, SZ 2007/40 = RWZ 2007, 169 (*Wenger*) = GesRZ 2007, 266 (*Schopper*) = ÖBA 2007/1451 (*Koziol*) = *Schopper*, GeS 2008,4 = *Schmidt*, GesRZ 2009, 317*;* 22.10.2007, 1 Ob 134/07y; compare RIS-Justiz RS0122035, last judgment of the Supreme Court from the 11.10.2012, 2 Ob 117/12p; further 22.11.1983, 2 Ob 580/83; 26.03.1980, 1 Ob 545/80, SZ 53/53; 13.06.1978, 5 Ob 511/78, SZ 51/88; 10.12.1992, 6 Ob 656/90, SZ 65/155; J. Reich-Rohrwig, in: *Wiener*..., § 25 nr. 316 ff; J. Reich-Rohrwig, *GmbH-Recht*..., nr. 2/454; H. Schumacher, in: *Österreichisches*..., § 69 IO nr. 112 ff; J. Reich-Rohrwig, C. Grossmayer, K. Grossmayer, A. Zimmermann, in: *Kommentar*..., § 84 nr. 746 und 751; for Germany BGH 06.06.1994, BGHZ 126, 181; BGH 07.11.1994; 25.07.2005, II ZR 390/03; 05.02.2007, II ZR 234/05, BGHZ 171, 46*;* II ZR 204/09; II ZR 130/10; II ZR 394/12; II ZR 113/13; with reference to J. Reich-Rohrwig, *GmbH-Recht*..., nr. 2/454 and H. Schumacher, in: *Österreichisches*..., § 69 IO nr. 112 ff.

from the authorization of the employees to place orders independently. The prerequisite is that the insolvency, at the time of the authorization, has already occurred or is imminent, but the managing director nevertheless (negligently) is not aware of the situation.

If the contracts with the business partners were concluded after the obligation to file for insolvency arose, the conditions for position of a guarantor by statutory law would also be fulfilled because this constitutes a breach of § 69 IO, whose purpose is precisely to protect creditors from suffering damage[34].

Summary

According to the Austrian Criminal Code, in case of an offence committed by omission, in addition to the elements of the active commission of a criminal offence, the requirements of § 2 StGB must be fulfilled in order to trigger criminal liability. This paper focuses on issues related to the liability of corporate management whose inactivity in certain spheres may invoke some substantial damage to the assets of the company.

Keywords

Omission, guarantor, sources of obligation, criminal law

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[34] In addition, it should be pointed out that, in order to be punishable as a contributor or direct perpetrator of fraud by omission, it would also be necessary to examine the equivalence of omission with an active action, i.e. whether the omission is as a grave violation of law as active behavior would be. Compare for example K. Kirchbacher, A. Sadoghi, in: *Wiener*..., § 146 nr. 29 f.

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