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Supreme Court rules on non-bank loans

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As non-banks do not usually issue loans, loans to shareholders may be granted only in exceptional cases where the disbursement can be reconciled with the diligence of a reasonable manager.

Overview

When a limited liability company (known in Austria as a GmbH) grants a loan to a shareholder, the parties must factor in (as in cases where capital contributions are returned) whether the shareholder's situation will be bettered compared to other contractual partners of the company. The GmbH must also consider whether the shareholder is receiving preferential treatment and whether this disadvantages the company. This will regularly be the case with loans, because non-banks usually grant monetary loans. Therefore, loans to shareholders may be issued only in exceptional cases where the disbursement can be reconciled with the diligence of a reasonable manager. This decision must also consider that a company granting a loan to a shareholder does not have the same possibility as a bank to spread its risks; rather, it is burdened with a so-called 'lump risk'.

Case law

The Supreme Court recently ruled in a case in which a loan was granted without collateral and obviously served to finance the acquisition of the target's shares. Considering that this withdrew considerable funds from the company, putting creditors at risk without any operational justification, the Supreme Court held that it could not be reconciled with the diligence expected from a reasonable manager.

The court believed that the argument that a customary interest rate was agreed overlooked that the comparison between other loans must not only consider the specific terms of the agreement, but also the question of whether such a deal could have been concluded with a non-company third party.

Section 83(1) of the Limited Liability Companies Act demands that shareholders must refund a payment from the company if the payment contravenes the law, the articles of incorporation or a decision by the company. The only exception concerns profits received by the shareholder in good faith. Further, Section 83 of the act is meant to ensure that the company's assets remain undiminished, even if such assets exceed the nominal capital.

According to the court, in case of a violation, the company can claim a refund against the shareholder who received the illegal payments (services) and the managing directors (if they acted with culpability). The remaining shareholders are subject to subsidiary liability only if and insofar as the company's assets were reduced below the nominal capital by the illegal payment. The court ultimately held that whether the violation of Section 82 was discernible was irrelevant to the obligation to refund the payments, in accordance with Section 83(1) of the act.

For further information on this topic please contact Klaus Oblin at Oblin Melichar by telephone (+43 1 505 37 05) or email (klaus.oblin@oblin.at). The Oblin Melichar website can be accessed at www.oblin.at.

AUTHOR

Klaus Oblin