Topics in our issue:

A new life for the Act governing the reorganisation of undertakings?

For much of the past, reorganisation procedures based on the Act governing the reorganisation of undertakings (Unternehmensreorganisationsgesetz; URG) were for all intents and purposes "dead law". However, a current celebrity case has given the URG a new lease on life. Nevertheless, the URG is of importance also apart from such rare instances – as a tool to prevent difficult issues of liability on the part of managers and management board members.

Since its passage in 1997, only a handful of reorganisation procedures have been performed in line with the URG. But now media attention is drawn to it due to the reorganisation procedures applied for and instituted by Kärntner Landesholding.

The reorganisation procedure based on the URG aims to provide an instrument to help tottering but as yet still solvent undertakings to recapitalise themselves as early as possible. Once the process has been launched, a reorganisation schedule needs to be submitted both to the court and a court-appointed auditor which describes the reasons for the undertaking's need to reorganise and the measures to be taken to improve its situation. If the auditor considers the schedule to be feasible, proceedings will be halted and the undertaking needs to inform the court, on an ongoing basis for not more than two years, of the progress of the measures taken.

There were probably several reasons in the past why reorganisation processes under the URG were applied on extremely rare occasions only. Small-scale enterprises seem to be mostly unaware of this option. In larger companies and in particular those that require mandatory auditing, many potential proceedings may well be averted by early measures, taken at the latest when the auditor exercises his/her duty of disclosure.

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Quite possibly, entrepreneurs are wary of instituting court proceedings in the runup to an insolvency.

The reorganisation procedure for Kärntner Landesholding is bound to be closely attended. Nevertheless, it appears to be a one-off case only rather than a pointer that court-driven reorganisation may become more important in the future. Nevertheless the URG merits greater attention because it contains several provisions that are of significance for GmbH managers and AG management boards.

Assumption of the need for reorganisation

The key to the issue are two indicators, regulated, respectively, in Section 23 URG (equity ratio) and Section 24 URG (fictitious period required for debt repayment). A company is considered in need of reorganisation when the equity ratio is less than 8% and the fictitious period required for debt repayment extends for more than 15 years. This assumption may be refuted on a case-to-case basis, e.g. by an expert opinion furnished by a chartered accountant stating that the company, for any given reasons, does not need to reorganise in spite of failing the above indicators.

Consequences on failing to meet the indicators

The failure to meet these "URG indicators" has consequences for GmbH managers and AG management board members, and possibly also for supervisory board members and GmbH shareholders:

A GmbH manager must promptly convene an extraordinary general meeting, failing which s/he may become liable to pay damages.

Managers or management board members of a company subject to auditing and operating an undertaking will be personally liable for up to € 100,000.00 respectively for debts not covered by the estate, if within the last two years prior to applying to institute insolvency proceedings they have (a) received the report of an auditor assuming the need for reorganisations and have failed to promptly apply for or to properly continue a reorganisation procedure, or (b) have failed to draw up an annual account in good time or to promptly instruct the auditor to carry out the audit. Accordingly, if a manager or management board member of an undertaking finds that the indicators for assuming the need for reorganisation have been met, they have to act immediately in order to avoid becoming personally liable. Supervisory board members and shareholders must not oppose an application to institute reorganisation proceedings at the risk of becoming liable.

Substitute equity

The URG indicators (equity ratio and fictitious period required for debt repayment) are of particular importance in relation to the Substitute Equity Act (EigenkapitalersatzGesetz; EKEG).

When a shareholder holding a stake of at least 25% grants a loan to the company to stay the crisis, this loan acts as a substitute for equity (subject to certain exemptions). Such equity-substituting loans must not be paid back before the company has been reorganised. In insolvency proceedings, equity-substituting claims are satisfied only subsequent to claims by other creditors, which in actual practice means that creditors holding equity-substituting claims typically come away empty-handed. An undertaking experiences a crisis as defined in the EKEG when it is assumed to be in need of reorganisation as defined in the URG.

Conclusion

In order to avoid incurring personal liability, managers and management board members should thus pay particular attention to the so-called URG indicators (equity ratio and fictitious period required for debt repayment). Companies subject to auditing have this threshold monitored by the auditor who will, if need be, exercise his/her duty of disclosure and warn the management.

Moreover, the URG indicators are of considerable importance for shareholders who grant loans to their company. If the company experiences a crisis as defined in the EKEG they need to be aware of the special risks attending to such loans.

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The importance of correctly recording employees' working hours

Ways and means to properly record working hours are replete with misunderstandings. Recent amendments to the Austrian Working Time Act (Arbeitszeitgesetz; AZG) have produced some relief for employers.

Under Section 26 AZG, all enterprises (including small-scale ones that employ only very few staff) need to keep records of working hours for all their employees, including part-timers and marginally employed persons. Even "all-in" contracts and the lump-sum payment of overtime do not affect this recording obligation. Exceptions apply only to executives and freelancers.

Correct records of working hours

Records of working hours comply with the AZG when they show the timing of actual working hours by calendar days and hours, including the beginning and end of breaks. It does not suffice to simply record the balance of working hours, except where the law provides for an exemption.

The law does not stipulate any particular recording system. The recording may be carried out by hand or electronically and it should be done on a day-by-day basis.

While it is permitted to oblige employees to carry out the recordings (which is standard in actual practice), the legal responsibility remains with the employer who needs to monitor and guide the employees.

New recording rules

The 2014 Act Governing Amendments to Labour and Social Law, which became effective on 1 January 2015, provides for some relief: the option to keep a simple balance of working hours has been extended –for employees who can mostly choose their working hours and place of work on their own (such as field workers) or who work mainly from home (tele-home-workers) it suffices to have records on the duration of the daily working time.

Contrary to the former situation, a general exemption is now granted for employees for whom a fixed schedule of working hours has been agreed in writing. When a duty roster has been agreed, employers need only to confirm compliance with the roster at the end of each remuneration period and on request of the labour inspectorate. Any deviations from such roster, however, need to be recorded on an ongoing basis.

Further options have been provided to do without the recording of breaks. If a works council agreement or, in companies without a works council, a written agreement with an individual determines the beginning and end of breaks, or if it is left to the employees when to take breaks within a specified period of time, daily breaks need no longer be part of the working hours record, always provided that there are no deviations from such agreement. Undertakings that have no works council are thus recommended to specify the beginning and end of breaks in the employment contract in order to avail themselves of this exemption – it does not suffice for the employer to issue a guideline or instruction.

Employer's duty of information

It is incumbent upon employers to give information to the labour inspectorate and let it inspect the records on request. Prohibitive administrative fines will be levied if the employer refuses access or furnishes no or faulty records. Furthermore, employees are entitled to receive the records once a month if they so request.

Sanctions on non-compliance

The consequences of infringing the AZG are sweeping. In addition to administrative fines payable upon a visit by the labour inspectorate, gaps in the working

hours records may have a negative impact on a tax audit, resulting in the additional payment of additional social insurance contributions and default interest. If records are missing, periods of limitation for asserting employee claims may be suspended. Missing records, moreover, may cause evidence problems in the event of unjustified overtime claims by employees.

Summary

The changes to the AZG make it much easier to keep records of working hours, but in actual practice need to be applied with great care. Considering the wide range of working hour models, it is possible to keep different records for different groups of workers. The consequences of lacking or faulty records should not be underrated.

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P) Inside

"Mens sana in corpore sano" was the motto firing nine Preslmayr enthusiasts who showed off their healthy bodies at the Wien Energie Business Run of 2015 to honourable results. Our "Preslmayr 3" team came in 667th among 8,194 teams, making it among the top five of the lawyer teams.

However, Preslmayr staff and partners are much better lawyers than runners, especially since our office regularly wins various law office rankings and awards. At the Business Run of 2015, we only just missed fourth place. But competitors beware: we have already started to train for the Business Run of 2016.

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