

## Liability of the Managing Director and the Shareholder in the GmbH (Private Limited Company) in Crisis

By Matthias Casper\*

### A. Introduction

#### I. The Term “Crisis”

The insolvency of a company does not arrive suddenly. Normally, insolvency precedes a crisis. At present, the term “crisis” is defined in § 32 a sec. 1 of the *Gesetz betreffend die Gesellschaften mit Beschränkter Haftung* (GmbHG – Private Limited Companies Act) as the point when the company does not receive any credits according to the usual conditions in the particular market and when the shareholders provide the company with further shareholder capital instead of debt capital. Besides the rules governing shareholder capital substitution, which will be omitted due to the upcoming reform of private limited companies,<sup>1</sup> there are few legal guidelines that regulate the standards of conduct for managing directors and shareholders in the case of a crisis. In particular, § 49 sec. 3 GmbHG needs to be singled out. This paragraph establishes an obligation to call a shareholder meeting if more than half of the capital stock is lost. If an adverse balance arises because of the payouts to the shareholders, the protections of §§ 30, 31 GmbHG will intervene. An adverse balance results when there is insufficient capital to cover the liabilities, ownership’s equity, and guaranteed capital. However these protections often do not suffice.

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<sup>1</sup> *Regierungsentwurf des Gesetzes zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen* (in the following RegE MoMiG – Government Draft of an Act to Modernise the Law Governing Private Limited Companies and to Combat Abuses), *Drucksachen des Bundestages (BTDrucks.)*, 16/6140 = *ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP)* 2007, supplement with No. 23. Concerning the omission of the law on shareholder capital substitution in favor of a subordination in the *Insolvenzordnung (InsO-Bankruptcy Act)*; See Gerrit Hölzle, *DEUTSCHES STEUERRECHT (DStR)* 1484, 1490 (2007); See Schäfer, *DStR* 2085, 2086 (2006); See Martin Winter, *DStR* 1484, 1490 (2007).

## II. *The New Regulation by the MoMiG, the Object of Investigation*

At this point two legal developments become relevant: the *Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen* (MoMiG – Law Governing Private Limited Companies and to Combat Abuses) and the judge-made doctrine known as *Existenzvernichtungshaftung* (liability arising from a withdrawal which destroys the economic basis of a company). According to § 64 sent. 3 n.F. (new text in the following n.F.) GmbHG, the managing director should be responsible for those paybacks to the shareholders that have led to the insolvency of the company even though those paybacks do not necessarily have to lead to an adverse balance as required by §§ 30, 31 GmbHG.

The following article gives an overview of this new regulation and points out parallels with liability arising from a withdrawal that destroys the economic basis of a company. The effects of changing the mainly discussed liability resulting from delaying the filing of an insolvency petition (*Insolvenzverschleppungshaftung*), shall also be illustrated. Liability resulting from delayed filing of an insolvency petition is partially regulated by the new MoMiG and is expanded as a deficiency competence of the shareholders.

### **B. *Insolvenzverursachungshaftung* (Insolvency Causation Liability) of the Managing Director Under § 64 sent. 3 n.F. GmbHG**

#### *I. Purpose of the Regulation*

With the new § 64 sent. 3 the duty to reimburse according to sent.1 (previously, § 64 sec. 2 GmbHG) will also be extended to those payments that were rendered to the shareholders and have led to the insolvency of the company, unless this situation was imperceptible as in the case of exercising proper care of an ordinary managing director.<sup>2</sup> For this reason, the temporal scope of the duty to reimburse and the intentional freezing of payments are shifted and advanced in time. The purpose of the regulation is to protect creditors by reducing the probability of insolvency. Unlike liability arising from delayed filing of an insolvency petition, § 64 sec. 1 GmbHG in connection with § 823 sec. 2 of the *Bürgerliches Gesetzbuch* (BGB–German Civil Code), the focus of § 64 sent. 3 n.F. GmbHG is *Insolvenzverursachungshaftung* (liability arising from the causation of insolvency)

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<sup>2</sup> In the new regulation it says: “Die gleiche Verpflichtung trifft die Geschäftsführer für Zahlungen an die Gesellschafter, soweit diese zur Zahlungsunfähigkeit der Gesellschaft führen mussten, es sei denn, dies war auch bei Beachtung der in Satz 2 bezeichneten Sorgfalt nicht erkennbar.“ The same obligation concerns the managing directors for payments to the shareholders as far as these payments had to lead to the insolvency of the company unless this was also not perceptible in the case of exercising the in sent. 2 identified care.

and not *Insolvenzvertiefungshaftung* (liability for the immersion of insolvency).<sup>3</sup> The parliament sought to combine substitute equity capital law with insolvency law.<sup>4</sup> The distribution of dividends and profits of the company before insolvency shall be avoided<sup>5</sup> and, in this manner, the protection in the preliminary stages of insolvency shall be strengthened. Unlike claims under §§ 30, 31 GmbHG, payments to the shareholders neither lead to an adverse balance nor enhance the deficit balance.<sup>6</sup> In relation to similar existing claims under § 43 sec. 3 in connection with §§ 30, 31 GmbHG, these are considered to be concurrent claims.

The new regulation also contains certain parallels in *Haftung aus einem existenzvernichtendem Eingriff* (the liability from a withdrawal which destroys the economic basis of the company). It does not, however, codify this unwritten legal concept conclusively.<sup>7</sup> The conclusive codification of this legal concept is not desired because the addressee of the liability is the managing director according to § 64 sent. 3 n.F. GmbHG<sup>8</sup> unlike the case of a liability arising from a shareholders' withdrawal that destroys the economic basis of a company. Ultimately, liability according to sent. 3 continues indirectly with the especially well-known concept of the "solvency test" in Anglo-Saxon law.<sup>9</sup> Among the quitclaim of financial barriers, according to a balance test like in §§ 30, 31 GmbHG, a payment to the shareholders will only be forbidden for the managing director if the liquidity of the company is at risk. In other words, when the ability of the company to fulfill its debts payable is

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<sup>3</sup> Equally Sven Greulich and Jan Bunnemann, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT (NZG) 681, 684 (2006); Karsten Schmidt, GMBH RUNDSCHAU (GMBHR) 1072, 1079 (2007).

<sup>4</sup> See Philip Böcker and Christoph Poertzgen, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT (WM) 1203, 1205 (2007); Béla Knof, DStR 1072, 1079 (2007).

<sup>5</sup> See Matthias Casper in STEUERUNGSFUNKTIONEN DES HAFTUNGSRECHTS IM GESELLSCHAFTS- UND KAPITALMARKTRECHT 33, 41 (Gregor Bachmann, Matthias Casper, Carsten Schäfer, and Rüdiger Veil eds., 2007); Dagmar Gesmann-Nuissl, WM 1756, 1763 (2006).

<sup>6</sup> RegE MoMiG, BTDrucks No. 16/6140, page 111; Casper, *supra* note 5, at 41; Gesmann-Nuissl, *supra* note 5, at 1763; Böcker and Poertzgen, *supra* note 4, at 1205; Greulich and Bunnemann, *supra* note 3, at 682.

<sup>7</sup> RegE MoMiG, BTDrucks No. 16/6140, page 112.

<sup>8</sup> Also, the shareholder may not be covered if the obligation of an insolvency petition has been devolved to him according to § 15 a sec. 3 n.F. InsO in the case of the limited company without management; *but see* Gerrit Hölzle, GMBHR 729, 731 (2007).

<sup>9</sup> This implicates RegE MoMiG BTDrucks 16/6140, page 112; *see also* Böcker, *supra* at, 1205; Seibert, ZIP 1157, 1167 (2006); Ulrich Noack, DER BETRIEB (DB) 1475, 1479 (2006); Greulich, *supra* note 3, at 683; Karsten Schmidt, *supra* note 3, at 1079; Knof, DStR 1536, 1537 (2007); Gerrit Hölzle, GmbHR 729, 730 (2007).

at risk.<sup>10</sup> The managing director has to make a prediction concerning the situation of financial solvency in the future. Also, the German managing director will be at least indirectly forced if he or she carries out the admissible payments to the shareholders in the future according to §§ 30, 31 GmbHG since, alternatively, he or she is threatened by liability according to § 64 sent. 3 n.F. GmbHG. Certainly, the discussion from Anglo-Saxon law cannot be exactly projected onto the new regulation, and individualized standards should be applied regarding the scope of sent. 3, 2. clause n.F. in connection with the interpretation of the care that is demanded of a manager.

## II. Open Questions

There are numerous open questions connected with this new regulation. At this point, presently unproblematic concepts like “payment”<sup>11</sup> and “shareholder”<sup>12</sup> do not have to be discussed. However, it is unclear if the issue of causing overindebtedness is also covered (discussed in detail *infra* at section B.III.1. of this article). Especially problematic are the questions of when a payment is considered the cause of insolvency and whether there has to be a temporal and factual connection between the payment and the inability to pay (discussed in detail *infra* at section B.III.2. of this article). Ultimately, the preconditions of the subsequent insolvency need to be clarified, including the manager’s application of proper care (discussed in detail *infra* at section B.IV. of this article).

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<sup>10</sup> More specifically, to the concept of the solvency test, see e.g. Engert, ZEITSCHRIFT FÜR DAS GESAMTE HANDELS- UND WIRTSCHAFTSRECHT (ZHR) 170, 296, 318 (2007); Peter O. Mühlert, DER KONZERN 151, 160 (2004); Rüdiger Veil in DAS KAPITAL DER AKTIENGESELLSCHAFT IN EUROPA, 91, 96 (Marcus Lutter ed., 2006); Carsten Jungmann, ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT (ZGR) 638, 647 (2006); see also Béla Knof, DStR 1536, 1541 (2007).

<sup>11</sup> Insofar it can be referred to the previous literature concerning § 64 sec. 2 GmbHG, See Joachim Schulze-Osterloh in GMBH-GESETZ, § 64 margin number 79 (Adolf Baumbach and Götz Hueck eds., 18th ed., 2006) (majority opinion); but see Karsten Schmidt in KOMMENTAR ZUM GMBH-GESETZ, § 64 margin number 23 (Franz Scholz ed., vol. 2, 9th ed., 2002).

<sup>12</sup> Every shareholder is a possible payee, a privilege of small shareholding like up to now known from § 32a sec. 3 sent. 2 GmbHG does not exist, see Matthias Casper in GROßKOMMENTAR ZUM GMBH-GESETZ 106 (Peter Ulmer, Mathias Habersack, and Martin Winter eds., vol. 3, 2008), § 64 margin number 106.

### III. Causing an Inability to Pay

#### 1. Liability also for Causing Overindebtedness?

Paragraph 64 sent. 3 n.F. GmbHG is limited to insolvency in terms of § 17 of the Insolvenzordnung (InsO – Insolvency Regulation).<sup>13</sup> The causation of overindebtedness (§ 19 InsO), that is to say, the situation when the equity capital is completely consumed and, therefore, there are more liabilities than existing assets, is not mentioned. This seems to depend on the association that, in the case of the causation of an excess of liabilities over assets, the liability of the managing director according to §§ 43 sec. 3, 30, 31 GmbHG would arise and would be adequate. Such a perception certainly does not reach far enough. In light of the purpose of the legal provision, which consists of protecting the company against advance looting, the liability of managing directors does not inevitably provide an effective protection on account of an interdicted repayment of the nominal capital, for example, concerning a marginal nominal capital.

#### 2. Causality of the Payment for the Causation of Insolvency

Undoubtedly, not every payment to the shareholders is suitable to cause insolvency. In fact, there must be a causal connection between the payment and the resulting insolvency. In the first comments concerning the new regulation there is mutual consent that a simple causality in terms of the cause-in-fact theory of causation (*conditio sine qua non* theory of causation) cannot be sufficient.<sup>14</sup> The government's statements in support of the reform present the same position, stating that the managing directors shall not be obliged "to reimburse any payments to the shareholders that have become in any way the cause of the company's insolvency."<sup>15</sup> On the contrary, the additional occurrence of any optional further causal contribution for an interruption of the course of causality will not suffice.<sup>16</sup> In fact, a judgmental reflection on the theory of adequacy is required that then needs to be adapted to the particularities of the purpose of § 64 sent. 3 n.F. GmbHG.<sup>17</sup> Thereby, it needs to be adjusted to a close temporal and factual

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<sup>13</sup> See Greulich and Bunnemann, *supra* note 3, at 684 et seq; different view Casper, *supra* note 12, at 107; Knof, *supra* note 9, at 1538.

<sup>14</sup> See Greulich and Bunnemann, *supra* note 3, at 685; Knof, *supra* note 9, at 1539; see also Böcker and Poertzgen, *supra* note 4, at 1207.

<sup>15</sup> RegE MoMiG BTDrucks 16/6140, page 112.

<sup>16</sup> In this sense however RegE MoMiG BTDrucks 16/6140, page 112.

<sup>17</sup> Similarly Knof, *supra* note 9, at 1539.

coherence between the payment and the occurrence of a shortage of liquid assets.<sup>18</sup> As a rule of thumb, it can be assumed that a payment to a shareholder will only be causal if the payment leads to the occurrence of insolvency within one year. As a secondary modification of too wide Causation of Insolvency, it has been suggested that causality only comes into question when an objective third person could see that a payment has a crucial significance for the liquidity of the company and can constitute a *Weichenstellung ins Aus* (strategic alignment into the expiration).<sup>19</sup> A similar concept reveals the recourse of the prognosis of preservation that has been developed in the framework of § 19 InsO.<sup>20</sup> However, the following can be proposed: if one already on the level of causality sorted out all payments that did not necessarily seem to result in the insolvency of the company, the possibility of exoneration according to sent 3, 2. clause n.F. GmbHG would contain no function. This would lead to an inadmissible shifting of the onus of presentation and proof with which the managing director is charged under the 2. Clause, whereas the company, as a matter of fact the trustee in bankruptcy, is charged with the presentation and proof of causality.<sup>21</sup> That is why, on the one hand, no payment, in the sense of wide causality, can be considered to be adequate but, on the other hand, it can only be required that, according to an objective third person, a payment is suitable to cause insolvency having regard to the concrete financial circumstances. In other terms, wide causality is only missing when insolvency can only occur because of chains of further, not readily foreseeable, circumstances.

The objection that a lawful alternative behavior, along the lines of arguing that the insolvency would have occurred even without the payments to the shareholders, is principally unsuitable<sup>22</sup> since a contributory causation already suffices, provided that the remaining circumstances were not impossible. If the illiquidity, in the sense of § 17 InsO, already existed in the moment of the payment, there is no space for the application of § 64 sent. 3 n.F. GmbHG.<sup>23</sup> If the managing director reconstitutes the liquidity of the company, for example, by disposing the shareholder to pay back the money, the chain of causality will be regularly broken if the illiquidity occurs later

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<sup>18</sup> RegE MoMiG BTDrucks 16/6140, page 112; See Greulich and Bunnemann, *supra* note 3, at 685.

<sup>19</sup> See Greulich and Bunnemann, *supra* note 3, at 685.

<sup>20</sup> See Knof, *supra* note 9, at 1536, 1541, and 1580.

<sup>21</sup> See Knof, *supra* note 9, at 1580, 1585 (justifiably points at the fact that, in the case of unavailable forecast data, the managing director also falls victim to the onus of proof whereby according to the here argued opinion it is a matter of the question concerning the subjective facts of a case); on its merits see also A. Schmidt, ZEITSCHRIFT FÜR DAS GESAMTE INSOLVENZRECHT (ZINSO) 975, 978 (2007).

<sup>22</sup> Insofar appropriate Böcker and Poertzgen, *supra* note 4, at 1208.

<sup>23</sup> *Id.* at 1208.

on. The opposing opinion of the *Bundesgerichtshof* (BGH – Federal Court of Justice)<sup>24</sup> in connection with the replenishment of the nominal capital according to §§ 30, 31 GmbHG cannot be transferred to sent. 3.<sup>25</sup>

#### *IV. Recognizability and Fault*

Like liability according to § 64 sent. 1 n.F. GmbHG (former § 64 sec. 2 sent. 1), liability according to the new § 64 sent. 3 GmbHG requires fault. However, § 64 sent. 3, 2. clause n.F. includes a possibility of exculpation of the managing directors when the inability to pay was also not recognizable by applying the due diligence of a prudent businessperson. Insofar as it needs to be adjusted to a subjective point of view of the managing director with relation to the standards of a prudent businessperson, certainly a strongly objective element takes effect. Nevertheless, this approach does not necessarily correspond to the point of view of the objective observer that is to be taken as a basis within the framework of causality (discussed in detail *supra* section B.III.2. of this article). Therefore, this proof of exoneration goes further than the discontinuity of the causation. This is relevant insofar as the decision is based on the prognosis that is required of a responsible managing director.<sup>26</sup> For this reason, the period of time based on prognosis is questionable. Regularly, this may not exceed one year.<sup>27</sup> One can orient oneself by considering the common period of time for financial planning in this company or in companies of the same size. Small to medium-sized enterprises plan their concrete payment flows usually not longer than one year in advance whereas, for the upcoming months after the disbursement, a more detailed payment is required than for the following months.<sup>28</sup>

Furthermore, for the right decision based on prognosis, the question of selecting certain information as a basis plays a significant part.<sup>29</sup> Also, it must be assumed that the managing director has to identify all this necessary information within the scope of short-term financial planning. The previous development of the volume of

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<sup>24</sup> BGHZ 144, 226 (340) = BGH NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2577 (2000); BGH ZIP 1256, 1257 (2000); BGH NJW 3629 (2002); BGH ZIP 2203, 2204 (2005).

<sup>25</sup> Equally Böcker and Poertzgen, *supra* note 4, at 1208; Hölzle, *supra* note 9, at 732.

<sup>26</sup> For more Details see Knof, *supra* note 9, at 1580, 1584.

<sup>27</sup> Further Knof, *supra* note 9, at 1580, 1582 (the ongoing and the following business year, which is to say, up to two years).

<sup>28</sup> See Greulich and Bunnemann, *supra* note 3, at 686; Knof *supra* note 9 at 1580 and 1582.

<sup>29</sup> Compare thereto also Greulich and Bunnemann, *supra* note 3, at 686; Knof, *supra* note 9, at 1580.

trade and the probability of the loss of outstanding funds is to be taken as a basis. Unusual circumstances like a big financial loss caused by the loss of a debtor only have to be included in the decision based on prognosis if, by applying the ordinary duty of care of a businessperson, they are expected. In practice, the managing director can orient himself or herself by taking into account the recommendations of the *Fachausschuss Recht des Instituts der Wirtschaftsprüfer – IDW zur Prüfung eingetretener oder drohender Zahlungsunfähigkeit bei Unternehmen* (Expert Committee on Legal Affairs of the Institute for Auditors Examining Occurred or Imminent Insolvencies of Companies).<sup>30</sup> The managing director cannot excuse himself or herself in the context of sent. 3, 2. clause n.F. by arguing that he or she was instructed by the shareholder to accomplish the payment because such a directive of the shareholder would be unlawful and the director was not authorized to carry out these instructions.<sup>31</sup> This is the direct consequence of the reference in sent. 4 n.F. to § 43 sec. 3 sent. 3 GmbHG.

### **C. The Liability Arising from the Causation of an Insolvency on the Basis of the *Trihotel Decision*, BGHZ 173, 246 (2007).**

#### *I. Overview and Formulation of a Question*

The heart of the *Gesellschaften mit Beschränkter Haftung* (GmbH – private limited company) is to limit liability. The shareholders do not have to invest into a bottomless pit. If the company is no longer profitable or if the shareholders do not want to continue with the company, the shareholders can sell items of property in order to transform them into liquid assets and liquidate the company within the terms of the statutory provisions. The legal concept of the so-called qualified factual consolidated companies has surfaced from initial adjudication over the law concerning industrial groups as a means of preventing abuses. After fundamental preparatory work of the former presiding judge of the Second Civil Senate, Volker Röhrich,<sup>32</sup> this concept was replaced by the *Existenzvernichtungshaftung* (liability arising from a withdrawal which destroys the economic basis of a company) that has an acknowledged interest in maintaining the legal continuity of the company in

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<sup>30</sup> IDW examination standards (*Prüfungsstandard - PS*): *Empfehlungen zur Prüfung eingetretener oder drohender Zahlungsunfähigkeit bei Unternehmen – IDW PS 800* of 22 January 1999, DIE WIRTSCHAFTSPRÜFUNG (WPG) 250 (1999); see also A. Schmidt, *supra* note 21, at 978; Engert, *supra* note 10, at 296, 325, and 327.

<sup>31</sup> RegE MoMiG BTDrucks 16/6140, page 113; Böcker and Poertzgen, *supra* note 4, at 1203 and 1207; Hölzle, *supra* note 9, at 732.

<sup>32</sup> Volker Röhrich, *Die GmbH im Spannungsfeld zwischen wirtschaftlicher Dispositionsfreiheit ihrer Gesellschafter und Gläubigerschutz*, in *FESTSCHRIFT 50 JAHRE BGH*, 83 (K. Geiß, K. Nehm, H.E. Brandner and H. Hagen eds., 2000).

the interest of its creditors. Following the first milestone in the adjudication, with the *Bremer Vulkanentscheidung*,<sup>33</sup> a first specification occurred in the *KBV Decision*.<sup>34</sup> Thereby liability arising from a withdrawal that destroys the economic basis of a company justified *Durchgriffshaftung* (piercing the corporate veil) to create direct liability of the controlling shareholder, which should lead to unlimited external liability of the shareholders. A repeated turnaround has been performed by the Company Law Senate of the BGH in its *Trihotel Decision* from the summer of 2007.<sup>35</sup> The BGH concluded that liability arising from a withdrawal that destroys the economic basis of a company is more like an internal liability based on § 826 BGB. Paragraph 826 BGB contains the concept that a person who, in an immoral manner, which is contrary to public policy, intentionally inflicts damage on another person is liable to the other person to compensate the damage. In the following, the extremely controversial, dogmatic classification of liability arising from a withdrawal that destroys the economic basis of a company shall be traced and its parallels to liability arising from the causation of an insolvency and to § 64 sent. 3 n.F. GmbHG shall be presented.

## *II. The Previous Interpretation Attempts of Liability Arising from a Withdrawal Destroying the Economic Basis of a Company*

Taking into account not only the so far presented adjudication but also the different and supremely various comments in literature, five different opinions concerning the legal foundation of liability for destroying the economic basis of a company can be identified whereof two plead clearly for internal liability and two for external liability. The fifth perspective constitutes the abovementioned adjudication that seeks to use an external liability tort law approach for defending internal liability.

The approach of the *KBV Decision*<sup>36</sup> argues that liability on the basis of misuse of the legal form has found widespread acceptance in literature.<sup>37</sup> According to this

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<sup>33</sup> See BGHZ 149, 10 = NJW 3622 (2001).

<sup>34</sup> See BGHZ 151, 181 = NJW 3024 (2002).

<sup>35</sup> See BGHZ 173, 246 = ZIP 1552 ff. (2007).

<sup>36</sup> See BGHZ 151, 181 = NJW 3024 (2002); see also Oberlandesgericht (OLG - Regional Appeal Court) Jena, GMBHR 115 (2002).

<sup>37</sup> See Martin Winter, ZGR 570, 591 (1994); Georg Bitter, WM 2133, 2137 (2001); Tim Drygala, GMBHR 729, 730 (2003); Gehrlein, NJW 1089, 1090 (2000); Haas, WM 1929, 1932 (2003); Jan Lieder, DEUTSCHE ZEITSCHRIFT FÜR WIRTSCHAFTS- UND INSOLVENZRECHT (DZWIR) 309 (2005); THOMAS LIEBSCHER, GMBH-KONZERNRECHT 499 (2006); Raiser, in Festschrift für Peter Ulmer, 493, 504 (Mathias Habersack, Peter Hommelhoff, Uwe Huffer and Karsten Schmidt eds., 2003); Vetter, ZIP 601, 602 (2003); MARC-PHILIPPE WELER, EUROPÄISCHE RECHTSFORMWAHLFREIHEIT UND GESELLSCHAFTERHAFTUNG, 140 (2004); V. Röhrich, *supra* note 32, at 103.

opinion, liability by reason of a withdrawal that destroys the economic basis of the company shall be a specification of *Durchgriffshaftung* (the general personal liability of the shareholder), which is equivalent to piercing the corporate veil in Anglo-Saxon jurisdictions for damages exceeding the share capital. The misuse of rights shall be identified in the lack of respect of the predetermination concerning the assets of the company and the disrespect of the guidelines of proper liquidation proceedings. This justifies a teleological reduction of § 13 sec. 2 GmbHG. However, according to the majority of the exponents who follow insofar an *obiter dictum* in the *Autokran Decision*,<sup>38</sup> the basis for a claim for the personal liability of the intervening shareholder shall be seen in an analogous application of §§ 1, 128, 129 HGB.<sup>39</sup> This unlimited liability due to the misuse of the legal form has been especially criticized and it has been pleaded for liability for damages.<sup>40</sup> A contrasting approach in literature wants to master external liability only by means of tort law.<sup>41</sup> As a starting point, § 826 BGB is predominantly chosen. The notable approach from *Altmeyen* based liability of the shareholder who withdraws money improperly from the company's assets upon an analogous application of § 43 sec. 3 by qualifying the shareholder as shadow director.<sup>42</sup> This is classified as internal liability.

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<sup>38</sup> See BGHZ 95, 330 (332) = NJW 188 (1986).

<sup>39</sup> *There to fundamentally* GEORG BITTER, DIE KONZERNRECHTLICHE DURCHGRIFFSHAFTUNG BEI PERSONENGESELLSCHAFTEN, 432 (2000). See also Liebscher, *supra* note 37, at 500; Raiser in GROßKOMMENTAR ZUM GMBH-GESETZ, § 13 margin number 152 (Peter Ulmer, Mathias Habersack, and Martin Winter eds., vol. 3, 2008); Emmerich, in Scholz, *supra* note 11, § 13 margin number 96; see e.g. Weller, *supra* note 37, at 176 and 184; Lieder, *supra* note 37, at 309.

<sup>40</sup> See Vetter, ZIP 601, 603 et seq (2003); Haas, WM 1929, 1940 (2003); Burgard, ZIP 827, 830 (2002).

<sup>41</sup> *Fundamentally now* Wagner, in FESTSCHRIFT FÜR CLAUD-WILHELM CANARIS 473, 489 (Andreas Held Rich, Juergen Prölss, Ingo Koller, and Katja Langenbucher eds., 2007); Zöllner, FESTSCHRIFT FÜR HORST KONZEN, 999, 1013 (2006); before already EMMERICH AND HABERSACK, AKTIEN- UND GMBH-KONZERNR (4th ed.) Anhang zu § 318 margin number 35; Rüdiger Veil, *Gesellschaftsrecht in der Diskussion*, 10 GESELLSCHAFTSRECHTLICHE VEREINIGUNG (VGR) 103, 113 (2005); Ulrich Haas, *Gutachten zum 66. DEUTSCHER JURISTENTAG (DJT) E. 83* (2006); Barbara Dauner-Lieb, DSrR 2034, 2041 (2006); see now also Weller, DSrR 1166, 1168 (2007).

<sup>42</sup> See Holger Altmeyen, ZIP 1837, 1847 (2001); the same NJW 321, 323 (2002); the same ZIP 961, 966 (2002); the same ZIP 1553, 152 (2002); see also Wilhelm, NJW 175, 178 (2003); see also Schön, ZHR 168, 268, 289(2004) (tendency for the group of cases of the "*Spekulation auf Kosten der Gläubiger*" (speculation at the cost of the creditors)); Wilhelm, JURISTISCHE PERSON 285 and 335 (1981); Flume, BGB AT I/2 88 (1983). In contrast particularly see Ulmer, ZIP 2021, 2025 et seq (2001).

In contrast to this is a fourth and widespread opinion in literature<sup>43</sup> that also defends an internal liability and estimates a violation of the existing and arising special relationship between the limited and the shareholder on the basis of the freedom of contract. This special relationship derives partially from a fiduciary duty of the sole shareholder over the company.<sup>44</sup> Other opinions, however, estimate a special relationship based on membership<sup>45</sup>. Consequently, the starting point for liability is any negligent breach of duty (§§ 280 sec. 1, 241 sec. 2, 276 BGB).<sup>46</sup>

The fifth approach, which follows a valuation directed against an internal liability, was presented by the BGH in the *Trihotel Decision*.<sup>47</sup> In *Trihotel* the BGH combined motivations and reasons from different approaches. Using § 826 BGB, the BGH first estimated all the tort law perspective. However, with the subsequent derivation of an internal liability that is based upon the functional proximity to §§ 30, 31 GmbHG, the BGH again argues close to the exemplars of internal liability.

### *III. Classification of a Withdrawal Destroying the Economic Basis of a Company as Liability for the Causation of Insolvency*

It needs to be considered that, in the discussion concerning the correct legal foundation of the liability arising from a withdrawal that destroys the economic basis of a company, a few positions are interweaved and, more precisely, determine the scope of liability. Above all, the question is whether the liability arising from *Existenzvernichtungshaftung* (a withdrawal that destroys the economic basis of a company) should be shaped as internal or external liability. However, there is mutual consent regarding the fact that the enforcement of claims arising from a withdrawal destroying the economic basis of a company in the case of an insolvency proceeding should be concentrated on the trustee in bankruptcy.

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<sup>43</sup> Compare to the aside from footnotes 45-47; see also Hans-Christoph Ihrig, DStR 1170 (2007) (who, however, leaves the exact basis of an internal liability finally open).

<sup>44</sup> See Ulmer, ZIP 2021, 2026 (2001); MARTIN WINTER, MITGLIEDSCHAFTLICHE TREUBINDUNGEN IM GMBH-RECHT 190 and 202 (1988); ZGR 570, 580 (1994)(the same); but see HANS CHRISTOPH GRIGOLEIT, GESELLSCHAFTERHAFTUNG FÜR INTERNE EINFLUSSNAHME IM RECHT DER GMBH 321 (2006) (same basic approach but speaks of an obligation for a *dezentrale Gewinnverteilung* (peripheral distribution of profits) deriving from a fiduciary duty); For an other view see Günther Hönn, WM 769, 771 (2008).

<sup>45</sup> Karsten Schmidt, NJW 3577, 3579 (2001).

<sup>46</sup> See Wolfgang Zöllner, *Gläubigerschutz durch Gesellschafterhaftung bei der GmbH*, in FESTSCHRIFT FÜR HORST KONZEN 999, 1018 (Barbara Dauner-Lieb, Peter Hommelhoff, Mathias Jacobs, Dagmar Kaiser, and Christoph Weber eds., 2006).

<sup>47</sup> See note 35; once again confirmed by BGH ZIP 455, 456 (2008); BGH ZIP 1232, 1233 (2008); BGH WM 302, 303 et seq (2008); BGH WM 1402, 1403 (2008); BGH WM 761 (2008).

Liability arising from a withdrawal that destroys the economic basis of a company intends to close a gap in the protection system of creditors of the GmbH by creating an equation for the interferences beyond the barrier of §§ 30, 31 GmbHG. This kind of liability is not only linked to the disregard of the abstract earmarking for the specific purpose of the company assets in order to satisfy creditors but also to the interference that leads to the fact that the GmbH cannot completely or even partially satisfy its debts. This is to say that it is not about causation of short-term financial difficulties but about the deprivation of assets that are essential for the continuance of the GmbH. This was correctly expressed in the *KBV Decision* in 2002,<sup>48</sup> which used terminology such as *Haftung für Existenzvernichtung* (liability for a withdrawal destroying the economic basis of a company) for the first time.<sup>49</sup> This divestment normally ends in insolvency of the company provided that the interference is not exceptionally balanced by the allocation of new equity capital.

Considering this, the withdrawal destroying the economic basis of a company presents itself as updating the law by the enhanced liability for the causation of insolvency like the law with the MoMiG also intends to introduce in the form of the new § 64 sent. 3 GmbHG for the managing directors (discussed in detail at *supra* section B of this article). A systematic proximity to liability arising from delaying the filing of an insolvency petition suggests itself even if its addressee, subject to the new § 15a sec. 3 InsO (discussed in detail at *infra* section D of this article), is the managing director. This function and proximity speaks at first for classifying the liability arising from a withdrawal which destroys the economic basis of a company as tort law. Another argument is that the acknowledged interest in existence of the company is not recognized for the company itself but for the will of the creditors. Ultimately, liability arising from a withdrawal that destroys the economic basis of a company assures the function of liquidation proceedings that aim beyond § 73 sec. 1 GmbHG for the complete satisfaction of the creditors. That is unless, in the absence of sufficient assets, this is not achievable, in which case it works towards an equally proportional satisfaction of the creditors with the aid of the insolvency proceeding.

Recognizing the function of liability arising from a withdrawal that destroys the economic basis of a company as liability for the causation of an insolvency and its proximity to the liability of delaying the filing of an insolvency petition, which initially seems to speak for an internal liability, it seems that an insolvency proceeding is possible in order to achieve a proportional satisfaction of all creditors. Primarily, a comparison with § 64 sec. 2 GmbHG shows a movement in this

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<sup>48</sup> BGHZ 150, 61 (67) = NJW 1803 (2002).

<sup>49</sup> Critical concerning this terminology, particularly Zöllner, *supra* note 46, at 1003.

direction. However, a glance at the legal framework of the liability arising from delaying the filing of an insolvency petition according to § 823 sec. 2 BGB in connection with § 64 sec.1 GmbHG demonstrates that it is about external liability in the interest of the assignors. Nevertheless, they cannot enforce their claims in an individual process until it has been determined that the commencement of the insolvency proceeding for lack of assets is dismissed or continued as provided in the *Insolvenzordnung* (Bankruptcy Act) in § 92 InsO. In other terms, the question of an internal or external liability is not about an “either-or” but about the perspective of when enforcement of the liability by the creditors is still possible outside of an insolvency proceeding.<sup>50</sup> At least in the situation of an insolvency without assets, an internal liability is impracticable and, therefore, objectionable.<sup>51</sup>

In sum, liability arising from a withdrawal that destroys the economic basis of a company constitutes tort law liability in the interest of the creditors that represents, as liability for the causation of insolvency, a particular group of cases of § 826 BGB. From this follows, principally, fault-based external liability which, on the basis of § 92 InsO, cannot be enforced until the rejection of a trustee in bankruptcy for lack of assets according to the principle of priority of the creditors. The further, not yet fully discussed, preconditions of the liability as well as the legal consequences cannot be looked into in more detail due to reasons of space at this point.<sup>52</sup>

#### **D. Reform of Liability Arising from Delayed Filing of an Insolvency Petition**

##### *I. External Liability of Managing Directors*

Since the landmark *Decision BGHZ 29, 100* from 1959,<sup>53</sup> it has been widely recognized that the obligation of an insolvency petition constitutes a protective law in the sense of § 823 sec. 2 BGB.<sup>54</sup> The following compensatory damages target the

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<sup>50</sup> Insofar different view however Wagner, *supra* note 41, at 488.

<sup>51</sup> Equally besides the exponents of a direct liability of controlling shareholder, e.g. GRIGOLEIT, *supra* note 45, at 455; Ulmer, ZIP 2021, 2027 (2001); Schwab, ZIP 341, 347 (2008); *different view however* BGHZ 173, 246 = ZIP 1552, 1557 (2007).

<sup>52</sup> For further Details Compare Casper, *supra* note 12, Anhang § 77 margin number 124.

<sup>53</sup> BGHZ 29, 100 = NJW 623 (1959).

<sup>54</sup> See for example BGHZ 75, 96 (106) = NJW 1823 (1979); BGHZ 100, 19 (21) = NJW 2433 (1987); BGHZ 126, 181 (190) = NJW 2220 (1994); BGHZ 138, 211 (214) = NJW 2667 (1998); BGHZ 171, 46 (49, 51) = GmbHR 482 (2007); BGH GmbHR 599, 600 (2007); see also REICHSGERICHT JURISTISCHE WOCHENSCHRIFT (JW) 3301 (1935); FROM LITERATURE INSTEAD OF MANY see Lutter/Hommelhoff/Kleindiek GmbH-Gesetz, 16th ed, § 64 margin number 41; Rowedder/Schmidt-Leithoff GmbH-Gesetz, 4th ed., § 64 margin number 38; Scholz/Karsten Schmidt, *supra* note 11, at 37; Baumbach/Hueck/Schulze-Osterloh, *supra* note 11, at 90; and more in detail Joachim Schulze-Osterloh, in FESTSCHRIFT FÜR MARCUS LUTTER

quota deterioration damage that the assignors suffer due to the delayed filing of the insolvency petition.<sup>55</sup> A direct claim of the creditors is adjudicated against the managing directors which, according to § 92 InsO in the insolvency of the company, is added to the bankrupt company's estate by the trustee in bankruptcy as total loss of the creditors and is paid to the creditors by applying an increased proportion. In other terms, a direct claim of the creditors is only possible in cases of a rejection of the insolvency proceedings due to a lack of assets.

The MoMiG is going to shift the obligation of an insolvency petition (up to now regulated in § 64 sec. 1 GmbHG) into the insolvency law and it is going to regulate the obligation of an insolvency petition across all legal forms in § 15a n.F. InsO for all corporate enterprises. However, this is not going to change anything about the classification as protective law in the sense of § 823 sec. 2 BGB in the new GmbH law. The government's rationale concerning § 15a sec. 1 n.F. InsO, which corresponds factually to the previous § 64 sec. 1 GmbHG, cannot be inferred from the fact that a paradigm shift is intended. The question of its status as a protective law is not at all addressed.<sup>56</sup> Since the parliament anchored the insolvency petition in insolvency law, the previous classification as protective law cannot only be transferred but should also correspond to the intention of the reform.<sup>57</sup> The controversial, specific questions concerning the external liability according to § 823 sec. 2 BGB in connection with § 64 sec. 1 n.F. GmbHG, like the controversial involvement of the new creditors, will also be raised *mutatis mutandis* in the new law.

## II. *Subsidiary Deficiency Competence of the Shareholders in the Case of the Limited Company without Management*

According to previous law, the obligation of a petition of § 64 sec. 1 GmbHG applies only to the managing directors, the liquidators, or the de facto managing

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707, 708 (Uwe H. Schneider, Peter Hommelhoff, Karsten Schmidt, Wolfram Timm, Barbara Grunewald, Tim Drygala eds., 2000); Christoph Poertzgen, ORGANHAFTUNG WEGEN INSOLVENZVERSCHLEPPUNG 254 (2006).

<sup>55</sup> Concerning the controversial question if all new creditors may be included in the scope of application of § 64 GmbHG and if the trustee in bankruptcy is allowed to also collect their quota deterioration damage, see e.g. Casper, *supra* note 12, at 121.

<sup>56</sup> See RegE MoMiG BTDrucks 16/6140, p. 133 f.; however the *Bundesrat* (Upper House of the German Federal Parliament) points in his comment at the fact that insofar nothing may be changed about the applicable legal situation.

<sup>57</sup> See Karsten Schmidt, GmbHR 1072, 1078 (2007); Kallmeyer, DB 2755, 2759 (2007); Christoph Poertzgen, GmbHR 1258 (2007); the same ZInsO 574, 575 (2007); Béla Knof and Sebastian Mock, GmbHR 852, 854 (2007).

directors.<sup>58</sup> Also, after the new law goes into effect, the subsidiary obligation of a petition of the shareholders (§ 15a sec. 3 n.F. InsO) only steps in in the exceptional case of the *Führungslosigkeit* (limited company without management). This case is presumed when the GmbH does not dispose of a managing director or does not dispose of a serviceable mailing address.<sup>59</sup> Liability of the tortfeasor who is a shareholder but has not been appointed a managing director on the basis of a faulty violation of the obligation of a petition according to § 823 sec. 2 BGB is also basically eliminated in the new law as far as the preconditions of a *de facto* managing director are not exceptionally existent. In the case of a GmbH without management (§ 35 sec. 1 sent. 2 n.F. GmbHG), every shareholder is, according to § 15a sec. 3 n.F. InsO, obligated and, according to § 15 sec. 1 sent. 2 n.F. InsO, authorized to file an insolvency petition. Consequently, a deficiency competence of the shareholders is created. An exception will only be provided if the shareholders have not known about the lack of management *or* about the existence of a reason for insolvency.<sup>60</sup> The scope of application of § 15a sec. 3 InsO should also be ranged over foreign companies which have their COMI (Center of Main Interest) in Germany, since the obligation of an insolvency petition according to § 15a InsO is classified as belonging to insolvency law and not to company law.<sup>61</sup> Also, the shareholder is subject to liability arising from delayed filing of an insolvency petition according to § 15a sec. 3 n.F. InsO in connection with § 823 sec. 2 BGB in the new law provided that he violates his subsidiary deficiency competence.

## E. Conclusion

The new regulation of the responsibility of shareholders for payments in advance of insolvency as well as the subsidiary contingent liability of shareholders for liability arising from delaying the liability of an insolvency petition are highly appreciated. They mark a step in the right direction even though there is still a lack of provisions regarding the still numerous insolvencies without assets. From a dogmatic point of view, there exists a strong relationship between the new liability of the managing directors for the causation of an insolvency and the liability of shareholders for the

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<sup>58</sup> See Casper, *supra* note 12, at 36 and 145 (concerning the scope of application and the concept of the *de facto* managing director).

<sup>59</sup> For more Details see Casper, *supra* note 12, at 168 et seqq; in depth details concerning the combat of the company without management by the MoMiG see Felix Steffek, *BETRIEBS-BERATER* (BB) 2077 (2007).

<sup>60</sup> In contrast to this, according to the government bill, the knowledge of one circumstance already did harm, consequently one was not allowed to have knowledge of both circumstances for not being obligated, see Casper, *supra* note 5, at 43.

<sup>61</sup> See Casper, *supra* note 12, at 33 et seq (more detailed reasons with further verifications also concerning the opposing view).

withdrawal destroying the economic basis of a company. Both cases concern liability arising from the causation of insolvency which should be classified as tort law. Residual inconsistencies remain particularly on the side of the subjective facts of the case. The BGH has assumed, up to now, that liability arising from a withdrawal which destroys the economic basis of a company based on § 826 BGB required intent of the shareholders<sup>62</sup> whereas the new liability arising from the causation of insolvency according to § 64 sent. 3 n.F. GmbHG only requires a single act of negligence.<sup>63</sup> This is not very reasonable. In my opinion, the preexisting contradictory valuation will have to be solved by taking hold of the valuation of § 64 sent. 3 n.F. GmbHG without hesitation so that liability arising from a withdrawal which destroys the economic basis of a company of the shareholders' pure negligence is also sufficient. The danger of uncontrolled shareholder liability needs to be compensated by a restrictive interpretation of the objective facts of the case.<sup>64</sup> Further debate in this context will be exciting and will certainly offer plenty of explosive issues to discuss.

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<sup>62</sup> BGHZ 173, 246 = ZIP 1552, 1556 (2007).

<sup>63</sup> See Günther Hönn, WM 769, 778 (2008) (equal result).

<sup>64</sup> See Casper, *supra* note 12, Anhang § 77 margin number 134 et seqq (further details).