

Legal Update Corporate

German Federal Supreme Court Revisits Managing Director Fiduciary Duties

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German corporate law recognizes that the managing directors of a company owe a general fiduciary duty to that company. The German term for this duty, *Treuepflicht*, generally translated as a duty of loyalty, is essentially as comprehensive and fundamental as the fiduciary duties owed by directors to companies in other jurisdictions. Above all, a managing director in Germany is obliged to refrain from acting in a manner prejudicial to the corporation, in particular, by using his/her position or authority in a manner to enrich himself at the company's expense.

Managing director fiduciary duties in Germany

Claims alleging a breach of a managing director's fiduciary duty are comparatively rare in Germany. German courts also tend toward conservative damages assessments, especially in cases where damages are founded on a loss of opportunity. As a result, the scope of a managing director's fiduciary duty at law has remained somewhat amorphous. None of the core

German corporate law statutes (*HGB*, *GmbHG*, *AktG*) refer directly to the fiduciary duty of a managing director toward a company. However, German courts and commentators generally agree that the fiduciary duty of a managing director toward a company at least incorporates the following elements:

- the managing director is prevented from exploiting his position in the company to enrich himself at the expense of the company, i.e. by accepting a commission fee in exchange for arranging a transaction with the company;
- in the event of a direct conflict of interest between the managing director and the company, the managing director will be obliged to act to protect the company; and
- the managing director must keep sensitive company matters confidential.

More generally, managing directors are obliged to consistently act for the benefit of the company and to prevent harm to the company, within reasonable

bounds. This rule founds e.g. a prohibition on managing directors from undertaking activities that compete with those of the company.

German Federal Supreme Court Decisions

In two recent decisions, the German Federal Supreme Court (*BGH*) addressed actions brought in the context of a breach of managing director fiduciary duties. In doing so, the *BGH* restated the principles applicable to managing director fiduciary duties and expanded the range of these duties.

I. “Managing directors in fact” also subject to fiduciary duty

In its decision dated 13 December 2012 (5 StR 407/12), the *BGH* addressed the issue of whether a person who served as a “managing director in fact”, i.e. without a formal appointment, is also subject to the fiduciary duty toward the company which governs a properly appointed managing director. The *BGH* concluded that while the test of whether an individual can be deemed to act as a “managing director in fact” is strict, once that test is met, the presumptive managing director will be bound by a fiduciary duty toward the company. In the case dealt with, this fiduciary duty was analysed in connection with a criminal embezzlement action. However, the “fiduciary relationship” (*Treueverhältnis*) determinative for the establishment of embezzlement charges is – in this context – identical to the fiduciary duty (*Treuepflicht*) existing between a managing director and a company. Where an individual assumes a *de facto* managing director position with respect to a company, he may not argue that the lack of a formal appointment precludes him from being governed by the fiduciary duties applicable to an appointed managing director.

II. “Business opportunity doctrine” applies to a civil law partnership

The German “business opportunity doctrine” (*Geschäftschancenlehre*) is a rule of law developed as an extension of managing director fiduciary duties. According to this doctrine, a managing director may not appropriate for himself a business opportunity that is originally allocated to a company. In practice, this doctrine has been applied to the managing directors of *Aktiengesellschaft* stock corporations and limited liability *GmbH* companies. In its decision dated 4 December 2012 (II ZR 159/10), the *BGH* found that this doctrine also applies to the managing shareholder-director of a civil law partnership, provided the partnership is formed for the purpose of commercial activity or serves as an acquisition vehicle.

III. Management must do “everything conceivable” to secure a business opportunity

In the decision noted at II above, the *BGH* sketches out a broad scope of application for this branch of the managing director’s fiduciary duty: the managing director’s duty obliges him to refrain from carrying on business for his own account in the “business sector” of the company without the company’s express permission, and he may not himself take advantage of transactions that fall within the company’s field of activity and which are already circumstantially allocated to the company. This will always be the case (as in the facts here) where the business is originally approached by a potential business partner and the managing director actively takes part in a first assessment of the opportunity on behalf of the company.

In keeping with earlier cases from previous decades, the *BGH* confirmed that where the facts establish that a

company is originally entitled to pursue a business opportunity, the managing director must do “everything conceivable” to permit the company to realize the opportunity (including attracting capital investment if the company is unable to finance the deal). The managing director will ultimately bear the burden of proof in showing that the company made a specific, recognisable and reasoned decision to abstain from the opportunity before the managing director may (potentially) avail himself of it.

Practical implications

The two *BGH* decisions show that managing director fiduciary duties are certainly not purely academic considerations. In particular:

- the *BGH* confirmed that fiduciary duties can also apply to “managing directors in fact”, and are not merely restricted to managing directors who are formally appointed;
- fiduciary duties also apply to the management of a civil law partnership (i.e. are not reserved solely for the managing directors of companies and general partnerships), provided the partnership pursues commercial activities; and
- before pursuing a business opportunity that was originally available to the company, a managing director must do “everything conceivable” to ensure that the company can take advantage of it.

Note

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