SKW Schwarz

The Liability of Managing Directors

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Note: This brochure is only intended to provide initial information and does not claim to be complete. Although it has been prepared with the greatest possible care, no liability can be accepted for the accuracy of its contents.

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Table of contents

Introduction and background of the presentation

SKW SCHWARZ is an internationally active law firm with a strong focus on corporate and insolvency law. Our clients include nationally and internationally active companies of all sizes.

A central issue in advising these is the question of the personal responsibility (liability) of the bodies of corporations – in the case of a limited liability company ***(GmbH)***, that is, the managing director.

In principle, the extent of a corporation's liability is limited to the company's assets (cf. section 13 para. 2 German Code for Limited Liability Companies ***(GmbHG)***. However, if there are breaches of duty by the legal representatives of these companies, they may be liable with, in addition to or instead of the company towards third parties, the company itself or even the shareholders. Therefore, it is important for every managing director to know the pitfalls and laws that can lead to his liability. We recommend interdisciplinary advice on all questions of company law as a preventive measure.

The liability problem is difficult to grasp legally because its foundations are to be found in different laws. Affected persons have to deal in particular with norms of the GmbHG, the German Stock Corporation Act ***(AktG)***, the Insolvency Code ***(InsO)***, the German Civil Code ***(BGB),*** the German Commercial Code ***(HGB*)**, the Administrative Offences Act ***(OWiG),*** the Fiscal Code ***(AO)*** and also the Criminal Code ***(StGB).*** In addition, the employment contract, a shareholders' instruction or a business allocation plan may also have an influence on the standard of liability.

The following presentation attempts to provide an overview of the most important bases of liability for the managing director of a GmbH. The new regulation of managing director liability in section 15 b InsO by the Act on the Further Development of Reorganisation and Insolvency Law ***(SanInsFoG)*** *as* of 1 January 2021 has also been taken into account. In addition, practical tips are listed which *are* intended to serve as suggestions for dealing with the risks outlined.

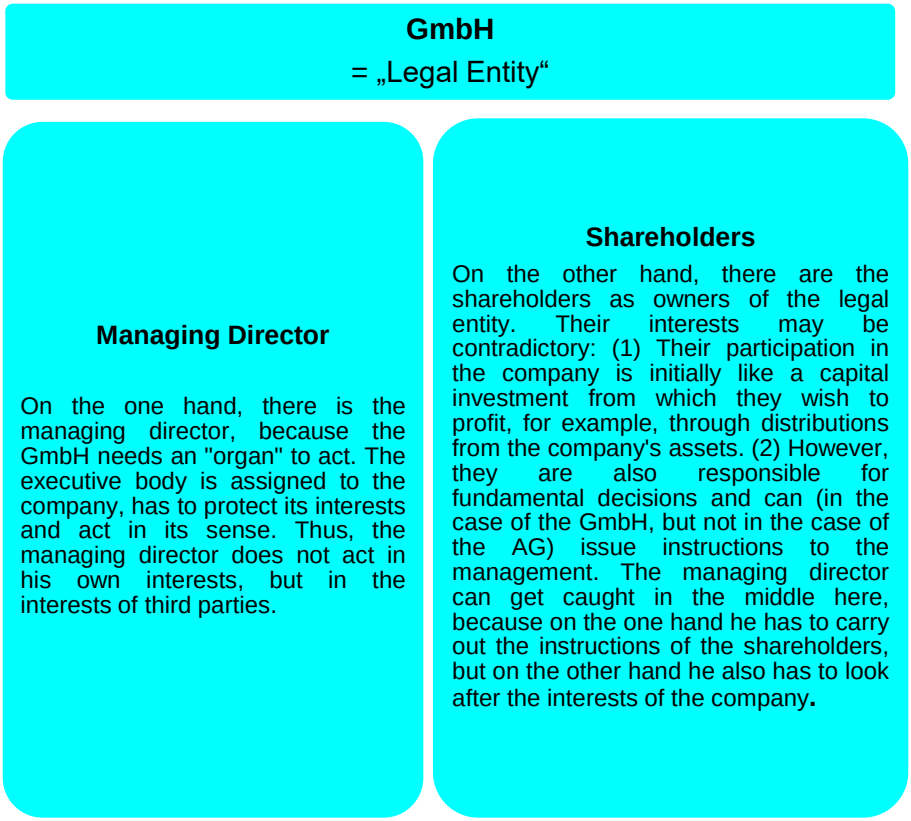
Practice Tip:

Unfortunately, this document cannot provide a conclusive presentation of the liability risks, because many liability bases are designed as indefinite general clauses. Their treatment requires a concrete legal classification in the individual case, which should be carried out by a lawyer.

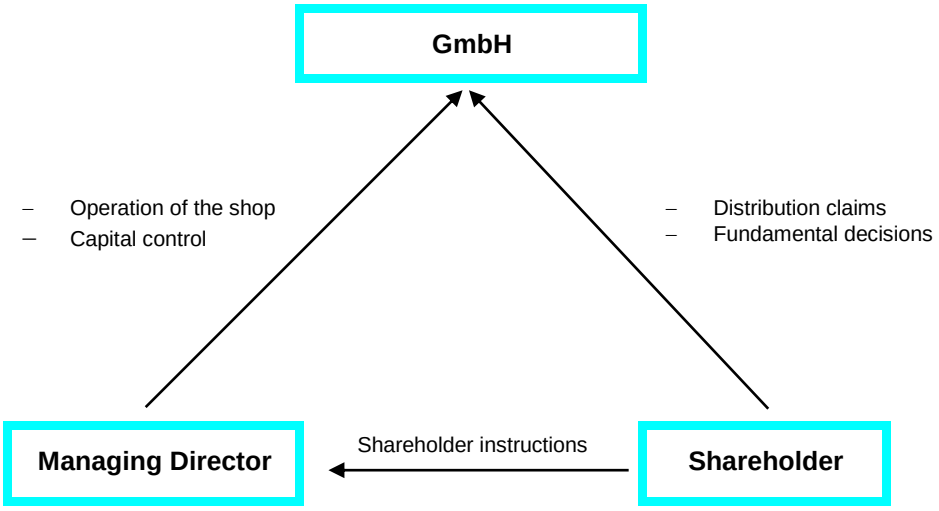
A. Introduction

I. Structure of a corporation

The problem areas of liability can be more easily understood if one considers the structure of a corporation: As a "legal person", the company is a legal entity in its own right. It has its own rights and obligations and can enter into contracts with other legal entities - including the managing director or the shareholders themselves. Essentially, there are two opposing positions:



A particularly delicate situation exists in this respect if the same person occupies the functions of the GmbH body and the shareholder. This is particularly the case with the so-called one-person GmbH. Here, although one person controls the entire company, he or she must manage the company professionally, irrespective of his or her personal interests. In these constellations, increased vigilance is required in order not to quickly become liable. On the tax side, it should be noted that when structuring the remuneration of the shareholder-director, there is regularly the risk of a so-called "hidden distribution of profits".



II. The liability system

In the case of claims against the managing director, a distinction must always be made between internal and external liability. The term internal liability refers to liability towards the company itself. External liability covers liability towards shareholders and third parties.

Internal adhesion

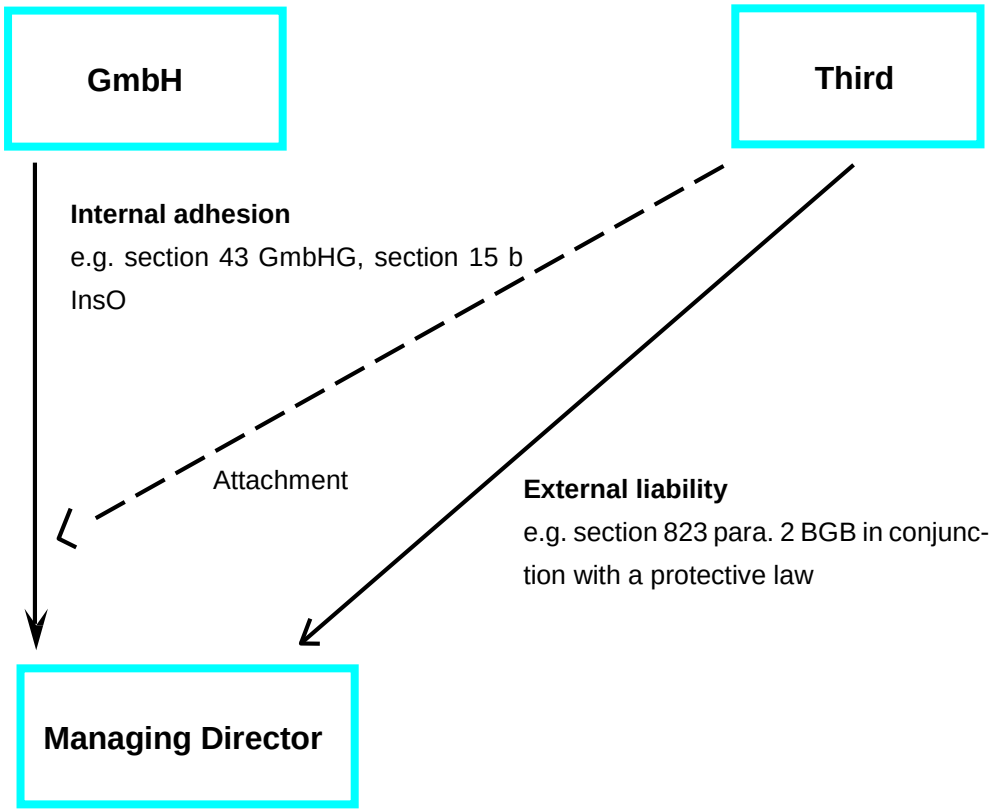
- Lack of due diligence, section 43 para. 2 GmbHG (cf. below **point C**)
- Infringement of regulations on the preservation of share capital, section 43 para. 3 GmbHG (cf. below **point D**)

External liability

does not exist in principle, because as a rule it is not the managing director personally but the GmbH that is the contractual partner of a third party. Therefore, a special provision is required which transfers the liability to the managing director, such as, in particular, the liability of the GmbH.

- Public law standards, e.g. for taxes and social security contributions (see below **point H**).
- Section 823 (2) BGB in conjunction with a protective law whose purpose is the protection of certain persons (so-called "third party protective norm").

The separation between internal and external claims can, however, be broken when pursuing legal action: A third party can first sue the GmbH itself and obtain a title against it. In order to enforce this title, he then has the GmbH's claims for compensation against the managing director seized and assigned to him.



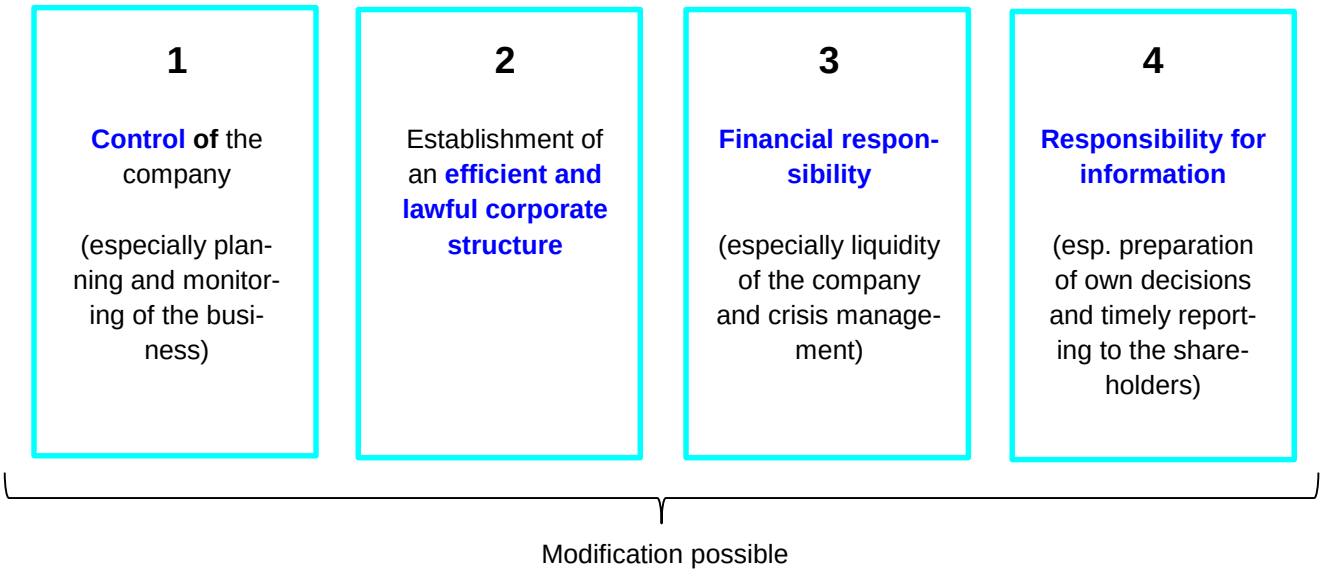
B. The field of action of a managing director

I. Powers

Unfortunately, the law does not contain an exhaustive list of the powers of a managing director. Section 35 GmbHG merely states that the company is represented by the managing director in and out of court. Beyond that, the law only explicitly assigns duties to the managing director in individual places.

In principle, therefore, the managing director must safeguard the interests of the company and act in its interests. This duty to manage the company includes all legal and factual acts that are involved in the ordinary operation of the company's commercial business. In this respect, the corporate purpose stated in the company's articles of association provides the framework. In addition, management includes all acts that are part of the ordinary administration of the company.

One can classify the tasks of the managing director into different categories:



by the articles of association, the business allocation plan, the rules of procedure or also by the managing director's employment contract. In any case, however, the following topics belong to the scope of duties of the managing director:

- → Receipt of declaration of intent,
- → Conclusion of contracts (e.g. employment contracts),
- → Organisation of the operational processes,
- → Corporate planning.

In addition, there are mandatory statutory duties that apply to every managing director – irrespective of any allocation of responsibilities, contractual provisions or shareholder instructions. These include raising and maintaining capital, submitting the required reports to the commercial register including the disclosure of annual financial statements, proper bookkeeping, fulfilling tax and social security obligations as well as other regulatory provisions such as permits under food law, trade law or similar. In the law, the most important obligations are as follows:

- → Proper accounting and preparation of the annual financial statements, sections 41, 42 GmbHG,
- → Control of company finances, section 30 GmbHG, section 15 b InsO,
- → Disclosure of the annual financial statements, section 325 HGB,
- → Convocation of the shareholders' meeting, section 49 GmbHG,
- → Duty of disclosure and information to shareholders, section 51 a GmbHG,
- → Payment of taxes and social security contributions, section 34 AO,
- → Applications to the commercial register, section 78 GmbHG,
- → Organisation of operations and supervision to avoid offences subject to penalties or fines, section 130 OWiG,
- → Obligation to file for insolvency, section 15 a InsO.

II. Borders

A managing director is not responsible for some areas of company management. These are also only partially listed in the law. In any case, a specific shareholders' instruction limits the managing director's management authority, at least as long as it is not null and void or pending invalidation (contestable resolutions are only binding after expiry of the contestation period). In addition, section 46 GmbHG assigns certain tasks to the shareholders for which the managing director also has no authority. These include in particular the

- → Approval (but not preparation) of the annual financial statements,
- → Resolution on the appropriation of profits,
- → Collection of deposits and repayment of additional contributions,
- → Division, consolidation and redemption of shares,
- → Appointment and dismissal of managing directors,
- → Measures to audit and monitor the managing directors,
- → Appointment of authorised signatories and authorised representatives for all business operations,
- → Representation of the company in legal proceedings against the managing director.

Furthermore, the managing director cannot undertake extraordinary measures, i.e. those that are not (or no longer) part of the ordinary operation of the company. This applies in particular to activities that contradict or are not covered by the company's purpose.

Practice Tip:

However, if such a measure outside the purpose is in the interest of the company, the managing director shall convene a general meeting of shareholders and obtain a resolution thereon.

C. Lack of due diligence, section 43 para. 2 GmbHG

The lack of success of a company is often attributed to the misconduct of its directors. However, the law rightly does not recognise any liability for failure. It does, however, require that every managing director behaves carefully. Therefore, section 43 para.1 GmbHG stipulates that managing directors must exercise the "care of a prudent businessman". Section 43 para. 2 GmbHG then standardises liability towards the company for damage caused by a breach of this due diligence.

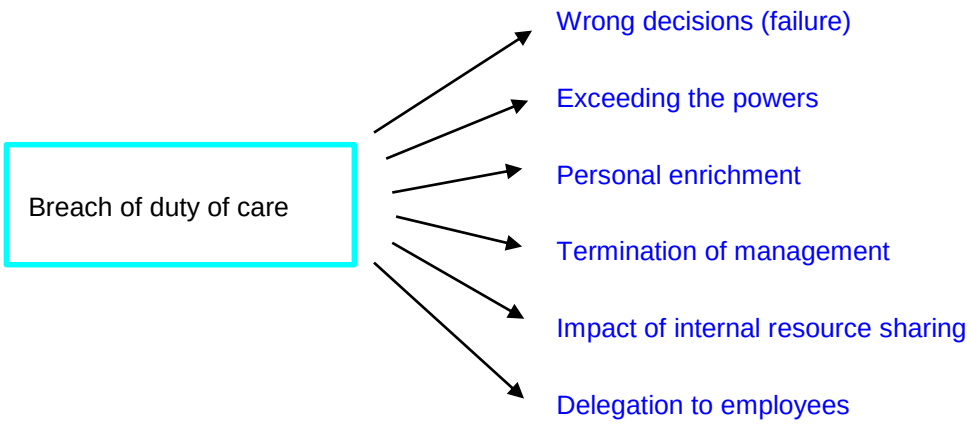
The managing director must behave in the same way as an independent, fiduciary administrator of third party property interests in a responsible managerial position would (so-called duty to safeguard interests). He must pursue the company's purpose as effectively as possible. In addition to the actual management of the company, this also includes a duty to organise the company. These general requirements are specified by law, employment contract, articles of association, rules of procedure or individual instructions.

However, the following is essential here: The standard of the requirements does not result from the personal skills and experience or the workload of a managing director, but is always based on the objectively expected qualification for the specific managing director position. This means that a managing director may also have to seek expert advice.

The claim for damages is due to the company, section 43 para. 2 GmbHG thus represents a case of so-called internal liability.

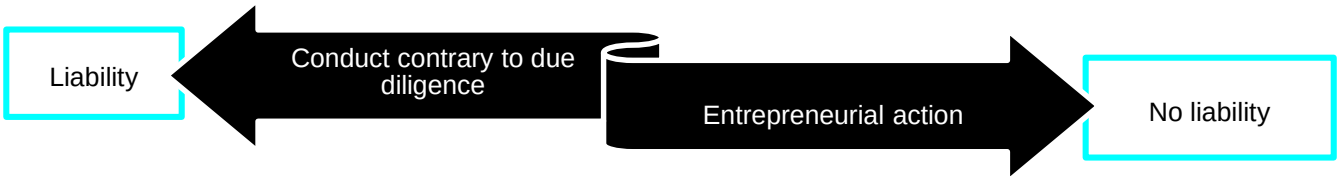
I. Typical case groups

In the course of time, a variety of court decisions have been handed down on the subject of duties of care. They can be divided into different groups of cases, of which some important ones will be presented below.



1. Wrong decisions (failure)

A managing director can only be held responsible for the company's lack of success if this has come about through negligent conduct. However, the distinction from entrepreneurial action is problematic. Such actions are often associated with conscious risk-taking.



Damage caused is not compensable if it was based on such a lawful entrepreneurial discretionary decision. This decision-making competence is the so-called *business judgement rule* originating in the Anglo-American legal sphere. In German law, it is laid down in section 93 para. 1 cl. 2 AktG and, according to unanimous opinion, applies equally to the GmbH:

> *"A breach of duty does not exist if the member of the management board [note: in the case of a GmbH, the managing director], when making an entrepreneurial decision, could reasonably assume to act in the best interests of the company on the basis of appropriate information."*

(Note not part of the wording of the law)

Compliance with due diligence is answered by answering the following two questions:

→ Was the decision carefully prepared so that the director acted "on the basis of adequate information" and

→ were the advantages and disadvantages of the upcoming options for action carefully assessed on this basis and was the decision thus oriented towards the "good of society"?

Practice Tip:

Case law has decided a large number of cases. For example, a breach of the duty of care was assumed in the following cases:

- Delivery of goods on credit without collateral
- Limitation of corporate claims
- Incorrect calculation of offer prices
- Lack of information of the shareholders or co-managing directors
- Lack of exploitation of business opportunities (even with only private knowledge)
- Cash shortfall
- Consultancy contracts with non-qualified persons
- Disloyal behaviour, e.g. competition violations or betrayal of secrets

2. Exceeding the powers

A measure of a managing director is in any case in breach of due diligence pursuant to section 43 para. 2 GmbHG if it is not (any longer) covered by his management authority, i.e. he was not allowed to carry it out at all.

If the managing director exceeds his internal powers, the company is nevertheless obliged externally due to his unlimited power of representation. However, the managing director is then liable to the company for the resulting damage. The only exception is if the contracting party is aware of the managing director's limited power of representation. In this case, the company may not be obliged at all.

Towards third parties

The powers of a managing director vis-à-vis third parties (the so-called power of representation in the external relationship) cannot be limited.

Towards society

However, this does not apply to the relationship vis-à-vis the company as well as vis-à-vis the shareholders (the so-called management authority in the internal relationship). Restrictions may arise here from:

→ Sections 45, 46 and 35 et seq. GmbHG
→ the employment contract
→ Rules of procedure adopted by the shareholders
→ Individual instructions

3. Personal enrichment

If a managing director personally profits from his position or the management of the company more than is appropriate, this also gives rise to his liability. This group of cases is particularly virulent in the case of managing partners, because in these constellations there is no control by another person. As already mentioned above (cf. **A.I.**), the tax side must always be taken into account here (hidden distribution of profits).

Thus, if a managing director benefits from a personal advantage to which he is not entitled, he must compensate the company for the resulting damage. Such an advantage can exist in many respects, but especially in the case of

- special personal commission on conclusion of contract,
- Self-granting of a soft loan,
- private travel at business expense,
- Employment of GmbH employees for private purposes,
- Violations of a non-competition clause or
- Use of knowledge acquired as a managing director for private purposes.

4. Termination of management

The duty of care according to section 43 GmbHG exists as long as the position as managing director continues. Therefore, a managing director is no longer liable for the future after resigning from office. The time of entry of his resignation from office in the commercial register is not decisive in this respect; rather, it has merely declaratory significance. Resignation from office is also possible irrespective of any notice periods in the employment contract, since the position as a director is to be considered independent of the employment contract (cf**. point B.** above).

However, there are some exceptions in which a resignation from office is not suitable to cause a disclaimer:

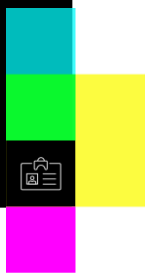
- In the event of a premature resignation from office, the Company may claim compensation for the resulting damage (e.g. due to increased costs in the search for a successor at short notice; normal costs for a search for a successor would have been incurred by the Company in any case).

- In the case of a one-person company, a resignation from office is also of little use because the managing director's responsibility for the company then follows from his position as a partner.

→ In the event of a "resignation at an inopportune time" and if this renders the company incapable of acting or if the managing director seeks to evade his obligations under insolvency law during the crisis (e.g. the obligation to pay taxes or social security contributions).

Practice Tip:

Resignation from office is typically an option if the managing director and the shareholder cannot agree on the further course of action to save the company. Another typical case of application is the execution of a shareholder's instruction which would mean a violation of legal regulations for the managing director (so-called conflict of duties).



5. Effects of internal resource sharing

Section 43 para. 2 GmbHG lays down the principle of joint responsibility, according to which each managing director is responsible for the legality of the company's management. Consequently, all managing directors of the company are "jointly and severally" liable for the damage incurred because, in principle, each managing director is responsible for all company matters.

In many cases, there is a division of competences in a multi-member management, e.g. for sales, purchasing or finance. However, such a division does not exempt the individual from the obligation to assume responsibility as such. Under certain circumstances, it can only lead to a lighter liability standard for the "non-responsible" managing director.

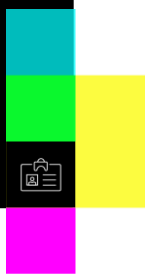
However, the prerequisite for this is always that the duty violated can be delegated at all. This is not the case, for example, with fundamental decisions on the company structure, reporting obligations to the commercial register and, in particular, the obligation to file for insolvency as well as the capital protection provisions (on this in detail later under **points D. and F.**). Here, all managing directors are always jointly liable, irrespective of any internal division of competences.

In contrast, a delegable decision in the case of an internal division of departments leads to a change in the scope of duties of the individual managing director: The non-responsible managing directors then

have supervisory and control duties with regard to the responsible managing director, the exact scope of which is determined by the specific individual case.

Practice Tip:

An internal allocation of responsibilities should not already be laid down in the articles of association, but should be regulated in an annex or rules of procedure. Only then can it be changed without notarial involvement. However, it should always be in writing and thus be provable.

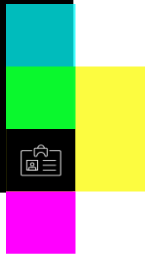


6. Delegation to workers: selection, instruction and supervision duties

Delegation is also conceivable in that certain duties are transferred to employees. Unlike in the case of a division of responsibilities among management bodies, in this case the managing director is not only subject to supervisory duties. Based on his management authority, he is also responsible for the proper selection and instruction of the employee concerned.

Practice Tip:

In these cases in particular, it is advisable to establish specifications regarding the flow of information within the company. There should be externally verifiable rules on standards and powers. Through such measures, a managing director documents that he or she complies with his or her duties of instruction and supervision.



II. Enforcement of the claim

If a managing director's liability under section 43 para. 2 GmbHG is at issue, the question of enforcing this claim regularly arises. In the following, some essential points will be discussed in this context.

- → In principle, the burden of proof in liability proceedings is distributed as follows: The company must prove damage and causality and show that the conduct causing the damage falls within the scope of duties of the managing director. The managing director, for his part, is then called upon to prove that he complied with his duties of care or that the damage would have occurred even if he had complied with them (so-called lawful alternative behaviour).

- → The liability claim under section 43 GmbHG is subject to a limitation period of five years (section 43 para. 4 GmbHG). According to section 200 BGB, the five-year period begins to run when the damage occurs, irrespective of whether the managing director has concealed the damage or not. However, the managing director's invocation of the statute of limitations due to fraudulent intent may be inadmissible if there has been an active cover-up of the misconduct on his part. In all other respects, the general provisions on the suspension of the statute of limitations apply, e.g. by filing a lawsuit, section 204 no. 1 BGB. A shortening of the limitation period in the managing director's contract is possible - with the exception of capital maintenance obligations.

- → The claim is asserted as follows: The shareholders decide on the assertion of the claim by shareholders' resolution with a simple majority, section 46 no. 8 GmbHG (a possibly affected shareholder-director may not vote). The resolution must also regulate the representation of the company with regard to the assertion of the claim, since the managing director is not (no longer) available as a representative as the party asserting the claim. The damages of the managing director are to be paid to the company, not to the shareholders.

- → The company's claim for compensation against the GmbH managing director cannot be enforced directly by creditors who have a title against the company. However, they can take action against the managing director after the GmbH's claim for compensation has been seized and transferred (cf. on this already above under **point A.II.**).

- → The ordinary courts and not the labour courts have jurisdiction for the action against the managing director because he is not an employee within the meaning of the Labour Court Act ***(ArbGG).*** The place of jurisdiction for the claim under section 43 GmbHG is at the registered office of the company (place of jurisdiction of the place of performance, section 29 Code of Civil Procedure ***(ZPO)***). In the case of any additional tortious claims, the jurisdiction is extended: The place of residence of the managing director or the court in

whose district the tortious act was committed may then also be considered, cf. sections 13, 32 ZPO.

→ With regard to a waiver or settlement, special rules exist only for the public limited company (section 93 para. 4 AktG). A GmbH, on the other hand, can settle or waive a claim without any problems, with a few exceptions.

III. Tips for avoiding liability

Agreements on the Limitation of liability

General limitations of liability not possible for the protection of third parties.

In advance
possible to a limited extent (but only in the internal relationship).

In retrospect
possible, e.g. by way of discharge by the shareholders pursuant to section 46 No. 5 GmbHG or by way of a general adjustment.

Documentation

Important due to the distribution of the burden of proof (see C.II.).

Documentation options include:

- internal notes,
- written justifications,
- Representations of decision-making,
- Receivables and risk management systems.

Instructions/approval of the Shareholder

Exemption from liability according to section 37 para. 1 GmbHG, provided that effective instruction/approval.
Particular attention should be paid to the following cases, as an instruction does not provide relief here:

- Violation of capital maintenance regulations (section 30 GmbHG) or in the case of unlawful acquisition of own shares (section 33 GmbHG) pursuant to section 43 subsection 3 sentence 3 GmbHG,
- existence-destroying intervention,
- Breach of the obligation to file for insolvency pursuant to section 15 a InsO,
- Breach of the law, of duties of care or of the articles of association.

Establishment of a Compliance organisation

The term *compliance* can be loosely translated as "lawful conduct", which means more concretely,

- that the managing director himself behaves in accordance with the norms and rules (so-called "duty of legality"),
- and that he organises the company in such a way that violations of the law are prevented as best as possible (so-called "organisational duty").

Typical steering instruments:

- Rotation plans for staff in sensitive positions,
- the issuance of "compliance guidelines",
- the appointment of a "compliance officer" or a reporting system for misconduct
- IDW auditing standard 980 or the Corporate Governance Codex.

D & O Insurance

A *Directors' and Officers'* (D & O) insurance is intended to cover liability risks of the managing director in the internal and external relationship.

In principle, the company itself has no claim of its own against the insurance company in the event of a loss, because initially only the managing director is entitled to the rights under the insurance (separation of liability and cover). However, the managing director can assign his claim for indemnification against the insurance company to the company.

There is no obligation to take out D & O insurance.

1. Agreement on limitation of liability: In advance, discharge, general settlement

A general limitation of liability for managing directors is hardly conceivable in GmbH law. This is because the company's assets should be available as a liability fund for third parties and must not be diminished by carelessness on the part of the shareholders.

Although a limitation of the managing director's liability in advance is considered possible, it is problematic due to the many different types of breaches of duty. Within the framework of an employment contract that the company concludes with the managing director, only the internal relationship and not the external liability can be covered. The managing director therefore always remains liable to third parties; he can only have a right of recourse against the company in the internal relationship if necessary.

With regard to a restriction in retrospect, on the other hand, the law provides some possibilities. Here, however, a distinction must be made between relief and general adjustment:

→ Discharge by the shareholders (section 46 no. 5 GmbHG)

The effect of the discharge of the managing director is that later claims for damages can no longer be based on facts that were known at the time of the discharge. However, this only applies to claims that the shareholders or the GmbH can waive.

→ General clean-up

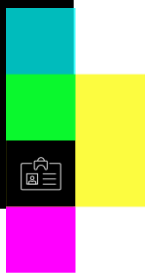
In addition to a discharge, a general adjustment can also be made. This is to be seen as a waiver by the GmbH of all known and unknown claims for damages against the managing director.

2. Documentation

An essential point in the enforcement of liability claims is the distribution of the burden of proof (cf. above **point C.II**). The managing director must prove in his defence that he acted with due care. This proof is much easier if the decision-making processes at the time are sufficiently documented. For example, internal memos or a written statement of reasons or of the decision-making process may be considered. In the case of somewhat larger companies, it is also required that suitable claims and risk management systems be established .

Practice Tip:

In the event of a claim, there is often a change in the management. The departing managing director is often faced with the problem that the documents essential for proving his diligence are located on the company's premises. Even if case law grants him a right to inspect files, a clause to this effect in the employment contract can be useful.



3. Instructions / approval of the shareholders

If managing directors follow the formal instructions of the shareholders' meeting, they are not liable because they have then not exercised entrepreneurial discretion (section 37 para. 1 GmbHG). Since a shareholders' resolution would be a mere formality in the case of the managing director of a one-person GmbH, the managing director is always deemed to be exempt in this sense. The same applies if all shareholders act jointly as managing directors.

The difficulty in this area is usually not in obtaining a company instruction, but in verifying whether the instruction in question was allowed to be given at all. This is because ineffective instructions do not lead to a release from liability. The degree of effectiveness of an instruction can also play a role: Resolutions that are void from the outset cannot exonerate the managing director. However, if the instruction is merely contestable and not ineffective from the outset, the managing director is liable if the contestation period has not yet expired or a contestation is to be expected. The exculpatory effect of a shareholders' resolution only takes effect after it has become incontestable. During the contestation period, the managing director is required to weigh the implementation interest of the instruction against the possibility of a successful contestation and decide accordingly.

If the shareholders approve a management measure, this approval is equivalent to an instruction. However, it must be of a certain quality; a mere non-binding acknowledgement by the shareholders is not sufficient. Notwithstanding this, instructions have no exculpatory effect on the managing director in the following cases:

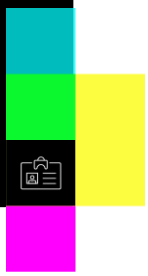
→ under section 43 para. 3 cl. 3 GmbHG in the event of a violation of capital maintenance

regulations (section 30 GmbHG) or in the event of an unlawful acquisition of own shares (section 33 GmbHG),

- → in the event of an interference that destroys the existence of the company within the meaning of section 826 BGB,
- → in the event of a breach of the obligation to file for insolvency pursuant to section 15 a InsO, and
- → in the event of a breach of the law, duties of care or the articles of association.

Practice Tip:

Despite these restrictions, it is advisable for managing directors to obtain advance protection through a shareholders' resolution when making risky business decisions. The legal point of reference here can be section 49 para. 2 GmbHG, according to which a shareholders' meeting must be convened if it "appears necessary in the interest of the company".
However, it should be noted that the exemption only concerns the relationship with the GmbH. If the managing director violates creditor protection norms at the same time, he is nevertheless liable to the creditors (reason: the shareholders cannot exempt third party claims with their instruction).



4. Establishment of a *compliance* organisation

For public limited companies, it is now recognised that management boards have a duty to set up a compliance *organisation.* This is the unanimous view of recent case law. According to this, boards of directors must organise the company in such a way that violations of the law do not take place.

The term *"compliance"* can be loosely translated as "lawful conduct". A *compliance* organisation should ensure that legal requirements and prohibitions are observed throughout the company. The aim here is to avoid liability cases and also to prevent a negative external perception. In more concrete terms, *compliance* means on the one hand that the managing director himself behaves in accordance with standards and rules (so-called duty of legality), and on the other hand that he organises the company

in such a way that violations of the law are prevented as best as possible (so-called duty of organisation).
Data compliance, i.e. the obligation of a company to ensure that its sensitive digital assets (usually personally identifiable information and financial data) are protected against loss, theft and misuse, is becoming increasingly important as companies accumulate more (personal) data than ever before.

Typical control instruments of *compliance* are for example

- → rotation plans for staff in sensitive positions,
- → the issuance of internal compliance *guidelines,*
- → the appointment of a *compliance* officer or at least a reporting system for misconduct (so-called *"whistleblowing"*).
- → For larger companies, there is the IDW Auditing Standard 980 or the Corporate Governance Codex.

Above all, however, a compliance *system must be* lived, i.e. potential areas of action must be constantly reviewed (risk analysis), the implementation of the requirements in the company constantly monitored and updated if necessary.

The question of the right scope of a *compliance* organisation for a GmbH has not yet been conclusively answered. Certainly, the principles developed for large companies cannot simply be adopted; they can at best serve as food for thought. There is also no obligation to implement certain *compliance instruments*. It is therefore recommended that GmbH managing directors first carry out a risk analysis for their specific company business and then systematically address the risk areas identified in this way. The result of such a risk analysis can be very different: For example, a trading company may focus on compliance with customs and VAT law, while an IT service provider should pay more attention to issues of data security and internet law.

5. D & O Insurance

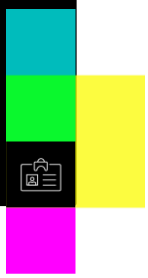
Directors' and Officers' ("***D&O***") insurance is intended to cover liability risks of the managing director in the internal and external relationship and is increasingly widespread among GmbHs. As a rule, the company takes out the insurance, while the rights under it accrue to the managing director. Although the managing director himself is responsible for taking out the insurance, he requires the consent of the shareholders in the internal relationship (section 46 nos. 5 and 8 GmbHG). In contrast to stock corporation law, there is no statutory deductible for the GmbH managing director, but a deductible can be contractually agreed.

In principle, the company itself has no claim of its own against the insurance company in the event of a loss, because initially only the managing director is entitled to the rights under the insurance (so-called separation of liability and cover). However, the managing director can assign his claim for indemnification against the insurance company to the company, so that this is transformed into a payment claim of the GmbH, which the GmbH can assert directly against the insurance company. A prohibition of assignment often stipulated by the insurance company in the past has been ineffective since 2008.

There is no obligation to take out a D&O insurance policy. However, it makes sense to take out insurance to cover any claims for compensation the company may have against the managing director.

Practice Tip:

Often the managing directors also have an interest in taking out D & O insurance. However, they have no right to do so, as the company's general duty of care does not go that far. It is therefore advisable to have the conclusion of a D&O insurance policy stipulated in the employment contract.



IV. Further legal bases of liability for breach of duty

The duty of care of the managing director has been described at the beginning in (**point C.**) as the "basic standard of liability". If, in addition to a breach of the duty of care, other legal provisions have been violated, this may result in further liability.

If the managing director violates a so-called protective law, his liability additionally arises from section 823 para. 2 BGB in connection with the respective protective law. A protective law is a norm whose purpose is the protection of an identifiable third party, e.g. many criminal offences such as fraud (section 263 StGB) or breach of trust (section 266 StGB) are such protective laws. A more detailed list of possible bases for liability can be found under **point I.III**.

D. Violation of share capital preservation regulations, section 43 para. 3 GmbHG

The share capital of every GmbH is subject to special protection because it primarily has a creditor-protecting function. Therefore, section 43 para. 3 GmbHG establishes increased liability for actions that damage the share capital.

I. Preservation of share capital, section 30 GmbHG

Section 30 GmbHG is the central norm of capital protection in GmbH law. Its purpose is to prevent capital from being returned to the shareholders - by whatever means. The basic rule is therefore:

> *The assets required to maintain the share capital may not be "paid out" to the shareholders.*
>
> *be "paid".*

The term "payment" of the share capital is not to be understood literally. Rather, "disbursement" can also be seen in a waiver of claims, in the granting of securities or generally in the conclusion of a contract. Only the following three cases are excluded from this:

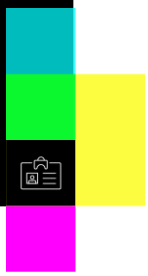
- → Existence of a control agreement (here the company places itself under the management of another company) or a profit transfer agreement (here the entire profit is transferred to another company) according to section 291 AktG
- → Existence of a fully-fledged claim for consideration or restitution against the shareholder receiving the payment
- → Repayment of a company loan together with its equivalents

The importance of the share capital has been somewhat relaxed by the reform of the GmbH in 2008, as the regulations on capital maintenance are now subject to a purely balance-sheet approach. This means that, for example, a loan to a shareholder from the share capital is possible as long as there is a fully valid counterclaim. In this case, the company's financial assets are merely replaced by a claim, i.e. another asset, a so-called asset swap in accounting terms. However, a violation of the balance sheet perspective still occurs if a transaction between the company and the shareholder takes place at inappropriate conditions, e.g. the GmbH pays too high a price for a service or item.

The share capital limit is to be determined in the same way as for the annual financial statements. The breach of duty by the managing director here can lie both in the payment itself and in a lack of monitoring of the payment transactions.

Practice Tip:

Managing directors should bear in mind that "sitting out" the contestation periods always entails the risk of delaying insolvency. This can lead to a collision of duties if the shareholders insist on waiting.
For the managing director, these new regulations mean that he must constantly check the validity of a restitution claim. He must therefore not only deal with the situation of the company, but also with that of his shareholders.



II. Acquisition of own shares, section 33 GmbHG

Since the GmbH as a corporation is a legal entity in its own right, it can in principle also hold its own shares. However, such an acquisition of shares is prohibited in the following cases:

- → The deposits have not yet been paid in full,
- → the acquisition is made with funds from the share capital, or
- → the acquisition is made at the expense of a reserve to be established in accordance with the articles of association, which may not be paid out to the shareholders.

III. Granting loans from company assets and "existence-destroying interventions

Section 43 para. 3 GmbHG is applied beyond its wording to two further constructions, which will be briefly mentioned below:

→ Granting of credit from the GmbH's assets to maintain the share capital to co-managing directors, authorised signatories or authorised agents (section 43 a GmbHG)

The granting of loans from funds of the share capital to the aforementioned groups of persons is prohibited. Any loans granted must be returned immediately without regard to any agreements to the contrary; in addition, a managing director is liable pursuant to section 43 (3) GmbHG.

→ Existentially destructive intervention

This is the case if the company is deprived of assets that it needs to fulfil its obligations and this deprivation must lead to or deepens the collapse of the company. This also includes business opportunities, the withdrawal of necessary personnel, etc. – i.e. assets that are not necessarily already covered by section 30 GmbHG.

The Federal Court of Justice ***(BGH)*** treats the interference that destroys a company's existence as a case of immoral intentional damage under section 826 BGB. The typical case of destruction of existence is the "cold liquidation", in which the GmbH is deprived of vital patents or means of production in favour of other companies without conducting proper liquidation proceedings. In principle, this claim for compensation is directed against the shareholders and not against the managing director, but the latter may be jointly liable under certain circumstances via section 43 para. 3 GmbHG.

IV. Legal consequences

In the event of a violation of the regulations on the preservation of share capital, the GmbH managing director must compensate the resulting damage. In the case of payment of the share capital, the recipient of the payment is additionally liable with the managing director as joint and several debtor, unless the latter was acting in good faith (section 31 para. 2 GmbHG). The acquisition of own shares also leads to the same result, because the recipient is in principle jointly liable due to unjust enrichment (section 812 BGB).

With regard to the statute of limitations, the place of jurisdiction and the burden of proof, the same rules apply as for section 43 para. 2 GmbHG (cf. **point C**).

Limitations of liability or even a waiver or settlement of the claim for compensation are factually excluded here, because the law prohibits this for cases in which the compensation is necessary to satisfy the creditors. Section 43 para. 3 GmbHG is regarded as mandatory law in this respect. Acting on the instructions of the shareholders also does not lead to a release of the managing director from liability by way of exception (section 43 para. 3 cl. 3 GmbHG).

E. Liability for acts of representation

A managing director must always make it clear in his or her actions in legal dealings that he or she is acting on behalf of a GmbH. This does not necessarily have to be done explicitly, but can also result from the circumstances (so-called company-related action). However, if this is not made clear, the managing director is personally liable from a legal perspective.

In addition, constellations are conceivable in which a managing director obviously acts for a company and nevertheless establishes personal liability. For this, however, the managing director's own additional obligation must always be established. For example, if the managing director declares,

- → that he wants to stand up for something personally (so-called willingness to stand up),
- → that the Company will meet its liabilities; or
- → that he has his own personal interest,

he may also be called upon personally under certain circumstances.

F. Procrastination in insolvency, section 15 a para. 1 cl. 1 InsO

A managing director is obliged to file for insolvency if the company becomes insolvent or overindebted. This is to ensure the timely initiation of insolvency proceedings so that GmbH creditors are protected from a further reduction of the liability mass and potential new creditors are protected from a conclusion of a contract.

I. Opening reasons

The law recognises three grounds for insolvency in the case of a GmbH:

Insolvency (section 17 InsO)	**Impending insolvency (section 18 InsO)**	**Over-indebtedness (section 19 InsO)** However, this does not lead to an obligation to file an application under section 15 a InsO.
A company is insolvent if it is unable to meet its due payment obligations; usually to be assumed if the company has stopped making payments. In the case of a short-term (max. three weeks) liquidity gap that can be remedied by an inflow of third-party funds, this is merely a payment stagnation and not yet an insolvency.	This is the case when the company will probably not be able to meet the payment obligations due (more likely than not).	A company is over-indebted if the company's assets no longer cover its existing liabilities.

II. Modalities of the application

Non-filing, incorrect filing or untimely filing of the insolvency petition is sanctioned. With regard to the point in time, the law basically assumes a filing of the insolvency petition.

> *"without culpable hesitation"*

off. That means the

> *"Application shall be made no later than three weeks after the occurrence of insolvency and six weeks after the occurrence of over-indebtedness".*

The insertion "at the latest *three weeks after the occurrence of insolvency and six weeks after the occurrence of over-indebtedness"* is not to be understood as a deadline that can be waited for without taking action. A postponement is only permissible if efforts are actually made to reorganise the company. However, if these have not been carried out at all or are not promising from the outset, the deadline does not apply and no waiting is permitted.

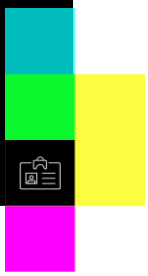
III. Legal consequences

Section 15 a InsO is basically a criminal offence: If a managing director negligently or even intentionally fails to file for insolvency, he can be punished with imprisonment of up to one year or three years or a fine.

In addition, however, he is liable to pay damages to third parties (under section 823 para. 2 BGB in conjunction with section 15 a InsO) and, as a rule, also to the shareholders (via section 15 b para. 4) InsO, cf. **point G.**). A breach of section 15 a InsO therefore leads to both internal and external liability.

Practice Tip:

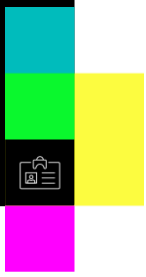
The threat of criminal and civil liability should not be underestimated: Since even the negligent and incorrect filing of the insolvency petition is sanctioned, a managing director should be particularly vigilant in a crisis. Because even independently of section 15 a InsO, liability under section 43 para. 2 GmbHG is possible if reorganisation measures were not initiated at an early stage.



With regard to the amount of the damage to be compensated, a distinction must be made between claims of persons who have already accrued prior to the occurrence of the obligation to file for insolvency (so-called old creditors) and those of the so-called new creditors who have acquired their claims only afterwards. Old creditors are to be compensated according to the so-called quota damage, i.e. according to the difference between the actual insolvency quota and the insolvency quota to be expected on their claim if the application had been filed in due time. This claim is asserted by the insolvency administrator against the managing director. New creditors, on the other hand, are to be compensated in full and must take action themselves.

Practice Tip:

Claims in connection with the GmbH insolvency are of great importance in practice, because it is one of the tasks of every insolvency administrator to examine and collect any claims of the company against the management. In addition to this, the managing director, because of his
D & O insurance is a worthwhile goal.



G. Payments after the onset of insolvency and payments to shareholders giving rise to insolvency, section 15 b InsO

Especially in a crisis, the managing director must pay special attention to the payment flows in the company. This is because the law wants to prevent disproportionate reductions in assets already in the run-up to insolvency. If a managing director violates these regulations, his payment remains effective in the external relationship, but in the internal relationship with the GmbH he must reimburse this payment. Depending on the recipient of the payment, a breach of duty giving rise to liability may exist even before the reason for insolvency arises.

In view of the fact that the insolvency frequency of a GmbH is above average in relation to other types of companies and that insolvency proceedings are regularly initiated too late, the practical significance of section 15 b InsO becomes clear. In practice, the "internal liability" of section 15 b para. 4 InsO has proved to be the more effective remedy than the "external liability" of section 15 a InsO in conjunction with section 823 para. 2 BGB. The case law on this is correspondingly extensive and confusing.

I. Payments after the occurrence of insolvency or determination of over-indebtedness, section 15 b para. 4 InsO

The concepts of insolvency and over-indebtedness have already been explained under **point F.I.** They also apply within the framework of section 15 b InsO. However, an imminent insolvency does not already lead to liability under section 15 b para. 4 InsO. The decisive factor is the point in time when insolvency maturity exists, not the expiry of the deadline for filing for insolvency under section 15 a InsO.

Although the wording of the offence only covers *"payments"*, it also covers all outflows of assets from the GmbH (withdrawal of liquidity), e.g. through direct debits, delivery in kind, offsetting or netting against claims of the company as well as the granting of rights. Not covered, however, is the incurring of liabilities, a waiver of claims or the failure to make an acquisition.

A special occurrence of damage is not required, but a so-called diminution of assets is: The act of the managing director must reduce the assets available for the satisfaction of the company's creditors.

- → This is the case, for example, with payments from the GmbH credit account, but not with so-called "anyhow costs", which would also be incurred in the event of insolvency.

- → If an expenditure on the assets side is offset by an income of at least equal value, the characteristic "payment" is already missing. Payments to avoid greater disadvantages, to

continue operations (wages, electricity, etc.) or those with the aim of restructuring (at least within the three-week period mentioned under **point F.I.**) can therefore be permitted.

→ A particularly important area is the payment of social security contributions and taxes. This is discussed in more detail in **point H.**

→ Even if the managing director settles debts with funds that have been made available to the company by a group company for this purpose, liability is established. This is because it is irrelevant where the company's assets come from. The only exception is if the company only receives the funds in trust and the donor has a right of segregation under insolvency law.

→ The payment from an unsecured debit account does not lead to a reduction in mass, because with this payment from credit funds only a creditor exchange takes place (supplier against bank) and the liability mass is not reduced with it. This applies in any case as long as the bank does not have collateral covering the payment, the use of which then leads to a reduction in mass.

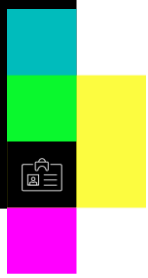
→ The payment to a debit account, on the other hand, represents a reduction of the assets in any case, because the GmbH loses a claim without the realisable assets increasing. The payment to a debit account does not increase the assets, but only leads to a reduction of the liabilities to the bank.

With the introduction of section 15 para. 4 cl. 2 InsO, the scope of liability was also limited. The management can now rebut the presumption of total creditor damage in the amount of the prohibited payments and is thus only liable in the amount of the actual damage incurred. However, according to section 15 b cl. 4 InsO, the management must prove that the actual damage is less than the total amount of the payments made. In addition, some argue that the new wording of section 15 b cl. 4 InsO, which speaks of damage to the creditors, means that the obligation to pay compensation is now structured as a claim for damages and is therefore also covered by a D&O insurance policy.

Practice Tip:

The concrete examination of the reduction of mass is very difficult and depends on the individual case. In the case of a payment to a debit account, it could be argued that this increases the company's credit line and that "permitted" expenditures can be made again in this amount. To be on the safe side, it must be meticulously ensured that payments are not made to debit accounts in the first place during a crisis.

In these cases, the GmbH managing director should open a new credit account and inform the company debtors of this new bank account. This will prevent the problematic payment to a debit account.



II. Payments to persons who have an interest in the legal entity, insofar as these had to lead to the legal entity's insolvency, section 15 b para. 5 InsO

Payments to persons who have an interest in the legal person (in particular shareholders) are also grounds for liability, insofar as these payments had to lead to the legal person's insolvency. With this ground for liability, the legislator wants to prevent companies from being plundered by their shareholders shortly before insolvency, for example by withdrawing valuable patents or other assets and thus no longer being available for realisation. For this purpose, the temporal connection of the prohibition of disbursement is brought forward. In this respect, the facts set out in section 15 b para.5 InsO have interfaces with the intervention that destroys the company's existence and the prohibition of disbursement of share capital to the shareholders, and must be considered in connection with these.

→ Payments

First of all, there must be a "payment" to shareholders. This term is basically to be understood as in section 15 b para. 1 InsO, but is adapted en détail. It includes, for example, distributions, set-offs and offsets, payments for services or transfers of use. Payments to related persons or even third parties are also considered payments to a shareholder if they have seized a claim of the shareholder against the company, because in these cases a payment indirectly benefits the shareholder.

→ **Insolvency of the company**

The payment to persons who have an interest in the legal entity must result in the insolvency of the company (the determination of over-indebtedness is not covered, unlike under section 15 b para 1 InsO). This causality requirement has a strongly limiting effect with regard to the scope of the regulation. The payment must directly lead to the insolvency of the company in the ordinary course of events without the addition of further circumstances. Unfortunately, the wording of the law is a bit muddled at this point, which is why there is some uncertainty with regard to the scope of this clause. If one imagines, for example, a group-affiliated GmbH that is to make payments to its parent company, the GmbH managing director would actually have to inquire beforehand what the financial situation of the entire group is. A legally secure specification of the causality requirement is likely to emerge only over time through the case law of the higher courts.

The assessment of whether a payment leads to insolvency usually requires a liquidity forecast, known as the *"solvency test"* from the English legal sphere. Here, the liquid assets are compared to the liabilities due or called in.

As a rule, a managing director must follow the shareholders' instructions (this has already been pointed out in **point C.III.3**). In the case of section 15 b para. 5 InsO, however, it is generally assumed that the managing director has a right to refuse payment, even if a specific payment order has been issued.

Practice Tip:

Particularly in the case of payments to the shareholders, the managing director is called upon to exercise special caution. This is because instructions from the shareholders are invalid if they violate the obligations of section 15 b InsO. The fact that an instruction does not always have the effect of limiting liability has already been discussed under point C.III.3.

III. Breach of duty of care

In both variants of section 15 b InsO, liability can only be considered if the payment was not compatible with the diligence of a prudent business manager (section 15 b para. 1 cl. 2 InsO). In a crisis, a prudent manager no longer focuses solely on the purpose of the company, but precisely on the interests of the creditors, so that a payment must bring more advantages than disadvantages to the creditors as a whole. The managing director does not necessarily have to have positive knowledge of the insolvency or overindebtedness; it is sufficient that he should have recognised it.

For payments to shareholders under section 15 b para. 5) InsO, the prevailing view is that the duty of care relates to the foreseeability of the occurrence of insolvency. Thus, a general justification of payments obviously leading to insolvency is not made possible.

It has already been explained that such payments are permitted that do not result in a reduction of the insolvency estate. Furthermore, such payments may be made to creditors entitled to separate satisfaction in the insolvency (e.g. in the case of liens or transfers of ownership by way of security) or to social security institutions or tax authorities (cf. **point H.**).

Practice Tip:

In order to prove this diligence, the GmbH managing director should be able to demonstrate by means of a liquidity plan that he always had a sufficient overview of the future cash flows of the company.
According to the BGH, the managing director has to consult a qualified person without delay in case of lack of professional knowledge and to work towards an immediate submission of the examination results of this person.
There may be cause for a detailed examination of the financial situation (outside of a crisis situation) if the share capital is under attack. In this case, interim balance sheets or a direct examination of over-indebtedness should be carried out. If half of the share capital is used up, a shareholders' meeting must be convened.

IV. Legal consequences

The claim under section 15 b para. 4 InsO is due to the company, but is asserted by the insolvency administrator in the event of insolvency (also subsequently).

Restrictions or even a waiver or settlement of the claim for compensation are also factually excluded here, because the GmbHG prohibits this for cases in which the compensation is necessary to satisfy the creditors. In the event of insolvency or over-indebtedness, it is presumed that payments were made in breach of duty, so that the burden of proof for the existence of the requirements of section 15 b para. 1 cl. 2 InsO lies with the managing director.

In fact, in addition to presenting the balance sheet (usually showing a deficit not covered by equity), the insolvency administrator will only be able to show that there are no significant hidden reserves in the individual balance sheet items and then demand all payments after the balance sheet date back from the managing director. It is then up to the managing director to present and prove why the conditions for liability were not met.

The claim is subject to a limitation period of five years; the limitation period cannot be shortened. Each payment creates a new claim and starts a new limitation period. The company is entitled to the claim and in practice it is asserted by its insolvency administrator or liquidator. However, creditors can seize the claim (subject to a bar under insolvency law) and then enforce it themselves.

If a claim is made against a managing director by an insolvency administrator after insolvency, he cannot, according to the prevailing opinion, argue against the administrator that the latter must contest the payment and indemnify the recipient (so-called plea of voidability). However, the manager can demand the assignment of the claims for restitution of the estate under avoidance law.

H. Liability for accounting, taxes and social security contributions

Every managing director has to pay special attention to the fulfilment of accounting, tax and social security obligations. One of the reasons for this is that wage taxes and social security contributions are only withheld and paid by the GmbH in trust for the employees. The managing director's power of disposal is therefore limited from the outset.

With regard to bookkeeping, the GmbHG contains special liability standards. The managing director is responsible for proper bookkeeping and accounting (sections 41 et seq. GmbHG), which specifically means that current entries and an annual financial statement must be prepared. This relatively elaborate process is required for every GmbH because there is no relief depending on size. In the event of a violation, the GmbH managing director is personally liable. There is also a special criminal law reinforcement to be considered in this area: According to section 283 b StGB (breach of the duty to keep accounts), the failure to prepare and the falsification of balance sheets is punishable. This applies irrespective of the existence of a reason for insolvency. Furthermore, the annual financial statements must be submitted digitally to the electronic Federal Gazette no later than one year after the balance sheet date (section 325 HGB). If this is not done, a fine of at least EUR 2,500.00 may be imposed.

In tax law, the managing director must fulfil the tax obligations of the GmbH (section 34 AO). This includes in particular the timely submission of tax returns with correct content. In the event of a breach of this duty, the managing director is personally liable under section 69 AO.

The managing director performs the function of the employer with regard to wage and social security contributions. It is his responsibility to withhold and pay the wage and social security contributions (sections 38 para. 3, 41 a para. 1 Income Tax Act ***(EStG)***, sections 20 et seq. Social Security Code IV ***(SGB IV)***. A violation initially leads to an obligation of the GmbH to make back payments. In addition, there is also a criminal law component, because embezzlement of the employee's share of social security contributions is a criminal offence that leads to personal liability of the managing director according to section 823 para. 2 BGB, section 266 a StGB.

The issue of paying social security contributions and taxes in a crisis is regularly the subject of legal disputes. A managing director is regularly affected by a conflict of duties here. On the one hand, he has to keep the GmbH's assets together in order not to expose himself to the danger of an insolvency delay (keyword capital maintenance). On the other hand, however, he must also pay the social security contributions and taxes due so as not to become liable to prosecution for withholding and misappropriation of remuneration. Based on current case law, the following principles apply both to claims due at the time of insolvency maturity and to older payment arrears still existing at that time:

→ **Employee contributions to social security** must be paid even in a crisis. The BGH does not apply the capital maintenance provisions here in order to release the managing director from his collision of duties. This applies in principle until the application for insolvency proceedings.

→ **Employer contributions to social security** are not covered by this, however. The capital maintenance regulations therefore remain valid. The background to this differentiation is that only the non-payment of employee contributions is punishable and the managing director is therefore not subject to a conflict of duties here.

Wage tax or turnover tax can also be paid according to case law, because managing directors are liable for amounts not paid. In contrast to social security, there are no penal sanctions for non-payment.

Practice Tip:

Due to the differentiation between employer and employee contributions, the respective payment should be provided with a concrete purpose.
Furthermore, it should be noted that the regulations on insolvency proceedings (sections 15, 15 a InsO) are still applicable. The managing director must therefore also keep an eye on the relevant deadlines.

I. Other liability cases

I. False information during formation and capital increase, sections 9 a, 57 GmbHG

If false information is provided by a managing director during the formation of a GmbH or during a capital increase, all managing directors are liable as joint and several debtors.

→ A classic case of application of this rule is an incorrect disclosure of the recoverability of a contribution in kind.

→ However, the so-called hidden contribution in kind is also covered. This is assumed to be the case if the registered cash contribution of a GmbH shareholder is to be fully valued as a contribution in kind from an economic point of view due to an agreement made in connection with the acceptance of the cash contribution (e.g. with the contribution in the amount of EUR 10,000.00 the delivery van of the contributing shareholder is acquired with an actual value of EUR 8,000.00 of the GmbH). In short, a hidden contribution in kind always exists if a cash contribution is only made for the sake of form, but an object is actually contributed. The reform of the GmbH in 2008 has eased liability at this point with the consequence that now only the difference between the actual value of the contribution in kind and the registered cash contribution (in the example: EUR 2,000.00) must be paid and the value of the contributed object is credited (section 19 para. 4 GmbHG). According to the old legal situation, the entire contribution was invalid and had to be paid again in full.

II. Breach of the managing director employment contract

The violation of the employment contract of a managing director is in principle not an independent basis for a claim by the GmbH because section 43 para. 2 GmbHG also covers this case.

However, the case may be different if the employment contract and/or the position as a member of a governing body no longer exists at the time of the damaging event of the managing director. A typical case of application in this respect is the violation of a post-contractual non-competition clause by the former managing director. In these cases, the managing director is obliged to compensate for the damage incurred in accordance with general civil law (section 280 BGB).

III. Criminal offences

At various points in these explanations, reference has been made to the criminal law consequences of individual bases of liability. The following is an overview of the most important criminal offences that may apply to a managing director.

- → The criminal offence of breach of trust (section 266 StGB) can be considered against the company. In the case of asset transfers, however, criminal liability under sections 283 et seq. and 14 para. 1 no. 1 StGB is also conceivable.

- → In relation to third parties, sections 263, 266, 266 a, 266 c and 283 et seq. StGB if, for example, the managing director deceives a business partner about the economic situation of the GmbH and thereby knowingly accepts that the business partner will be harmed.

- → Liability under section 130 OWiG is also conceivable. Section 130 OWiG is, as it were, the substitute liability of the executives of a GmbH for owner offences objectively attributable to this GmbH. The actual offence is committed by an employee who, however, is not liable due to his or her own lack of ownership. Therefore, the supervisor is liable under the law on fines for or in place of the GmbH, which is actually obligated but incapable of execution, for faulty supervision and organisation of the same.

J. Résumé

In the event of a breach of certain duties, the GmbH managing director may be liable both internally vis-à-vis the company and externally directly by the GmbH's creditors. The constantly changing economic framework conditions of the company therefore demand continuous vigilance from the managing director and should, as a rule, cause him to seek forward-looking advice in order not to be held personally responsible in the event of an escalation.

Your contact in the area of directors' liability

If you have any questions, please do not hesitate to contact us:

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