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NEWS

GROUP INTERESTS MAY BE TAKEN INTO ACCOUNT: LATEST DECISION FROM THE FEDERAL SUPREME COURT CONCERNING CORPORATE LAW LIABILITY WITHIN GROUPS

In its decision BGer 4A_268/2018 dated 18 November 2019, the Federal Supreme Court expressed its opinion on corporate law liability within groups. While groups are recognized under and are regulated by Swiss law in certain areas, their special features have so far hardly been taken into account in case law. However, the Federal Supreme Court has now decided in the present decision, with reference to the so-called Business Judgement Rule, that executive bodies of group companies may take the interests of the group into account when making business decisions. The decision is to be welcomed from an entrepreneurial perspective, as it reflects economic realities, leaves the board of directors room for entrepreneurial - and therefore necessarily risky - decisions, and creates greater legal certainty in group financing.

FACTS

The decision is related to the collapse of the Swissair Group in 2001 (*Grounding*).

Towards the end of the 1990s, the formerly Swiss airline Swissair Schweizerische Luftverkehr-Aktiengesellschaft (*Swissair*) was transformed into a group structure under the management of SAirGroup AG. In the course of this restructuring, a central group financing with uniform financial management (*Cash Pool*) was introduced to ensure group-wide liquidity. A Dutch company (*Pool Leader*), established specifically for this purpose, acted as operator of the so-called *Zero Balancing Cash Pooling*.

Swissair, which was responsible for the actual flight operations, participated in the group-wide Cash Pool, was a net creditor of the Pool Leader virtually all the time and had substantial credit balances with the Pool Leader until the Grounding. In addition, Swissair granted SAir Group AG fixed-term loans on an ongoing basis until the Grounding.

The estate of Swissair (*Plaintiff*) brought an action against several (former) organs of group companies and accused them of numerous breaches of duty; these essentially comprised the introduction of an illegal group organisation on the one hand and misconduct in connection with the management of Swissair's assets on the other.

KEY CONSIDERATIONS OF THE FEDERAL SUPREME COURT

With regard to the accusation of *introducing an unlawful group organization* (abandoning Swissair's financial independence), the Federal Supreme Court supported the assessment of the lower court, according to which in a group organization the uniform claim to leadership of the parent company is in an obvious conflict with the independent self-administration of the subsidiary, and this group paradox is solved in such a way that for group companies the list of tasks according to Art. 716a para. 1 of the Swiss Code of Obligations of the group companies is to be read in the sense of a teleological reduction in such a way that the board of directors of the group companies only has residual powers.

With regard to the *breaches of duty in the context of group financings*, the Federal Supreme Court, referring to previous Federal Supreme Court decisions, firstly emphasized that the granting of loans at market conditions to a parent or sister company was not inadmissible under capital protection rules. In the present case, however, the Federal Supreme Court no longer classified Swissair's intra-group loans to group companies as being at arms' length, in breach of capital regulations under corporate law and thus as illegal. The Federal Supreme Court nevertheless concluded in the specific case that there were no breaches of duty by the executive bodies of group companies, as the loans made available to the group could be used *in the interests of the group and indirectly also in the interests of Swissair*: Swissair's interest in *the continued existence of the SAirGroup and its sister companies* had been eminent, among other things because the group companies were responsible for the aircraft fleet and thus essential for the continuation of Swissair's flight operations.

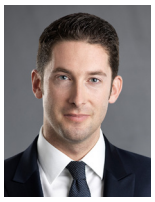
In doing so, the Federal Supreme Court made the

practically important finding that the granting of an unsecured loan, which would not have been granted to third parties on comparable terms and is not covered by freely distributable funds, does not necessarily constitute a breach of duty by the bodies of the creditor company responsible for the business.

In the specific assessment of the breaches of duty alleged by the plaintiff, the Federal Supreme Court referred to the so-called *Business Judgement Rule*, according to which the courts must exercise restraint in the subsequent assessment of business decisions that have been reached in a flawless decision-making process that is based on adequate information and free of conflicts of interest. The Federal Supreme Court thus recognizes that the board of directors is obliged to act in the company's best interests by taking entrepreneurial action, which includes taking reasonable risks.

RELEVANCE FOR THE PRACTICE

The decision of the Federal Supreme Court provides the board of directors with the scope it needs in practice to make entrepreneurial - and thus naturally risky - decisions, also with regard to financings within the group or the granting of *up-* or *cross-stream* loans. Nevertheless, it is still recommended to have such contracts or cash poolings legally reviewed prior to conclusion and, if necessary, to coordinate with the auditors in order to avoid unpleasant surprises during the audit.



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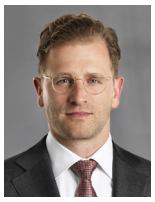

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