

Directors' liabilities - Sweden

1. Obligation to file?

- i) Is there an obligation on directors to file for formal insolvency proceedings?

In Sweden, the company's directors are under no express obligation to file a winding up petition. On the other hand, the actions or omissions of the directors when the company is insolvent may become the subject of a separate assessment if the company is placed into insolvent liquidation.

However, according to the Swedish Companies Act the company's directors are under an express obligation to prepare a special balance sheet to determine whether the company should be wound up i.e. if there is reason to believe that the company's equity is less than half of its registered share capital. Such a balance sheet must report assets at market value less sales costs, and liabilities in accordance with certain principles. If, according to the balance sheet for insolvency purposes, it proves to be the case that the equity is less than half the registered share capital, the issue of liquidation of the company must be put before the general meeting of the company. If the general meeting does not adopt a resolution regarding liquidation, the company has eight months to restore the registered share capital. If the company does not succeed, the company must be liquidated. If the company fails to commence liquidation proceedings notwithstanding an obligation to do so, the company may be the subject of compulsory liquidation. If the company fails to take these measures, the company's directors will be personally liable for new obligations incurred.

In these situations, however, the issue of liquidation of a limited company relates not to solvency but, rather, to sufficiency.

2. Who can be held liable?

- i) In addition to directors, which other persons involved in a company's affairs may be held personally liable for their acts, e.g., shadow directors, de facto directors, non-executive directors?

According to Chapter 15 of the Swedish Companies Act, in addition to directors, shareholders and the company's auditors are liable if they have damaged the company intentionally or through negligence in the performance of their duties. As regards shareholders, the obligation to compensate for damage to the company arises where a shareholder or other party, intentionally or through gross negligence, causes the company to incur damage by contributing to a violation of the Companies Act, the applicable Annual Accounts Act, or the company's articles of association.

3. Sanctions?

- i) What are the possible sanctions/restrictions against the directors of insolvent companies?

According to the Swedish Criminal Code, the directors of insolvent companies risk fines or imprisonment for, among other things, use of the company's funds without a corresponding benefit, favouring or

disfavouring a particular creditor, or false accounting in the event the company's accounts fails to comply with the requirements of the Swedish Book-keeping Act, etc.

As regards limited companies whose equity is less than one half of the registered share capital, the company's directors may become personally liable for obligations incurred after the obligation to go into liquidation arises.

If certain circumstances exist that render more difficult the directors' management of the insolvent company and, primarily, if the directors previously, in other companies, acted in bad faith towards the creditors, etc., the issue of disqualification of directors may arise. A disqualification entails that the director may not conduct business operations, i.e. he may not serve on the board of directors of a company, as a managing director, or hold any other senior position in any business operations.

ii) Are any of these sanctions/restrictions imposed automatically?

None of these sanctions are imposed automatically. On the other hand, a liquidator is obliged to investigate the directors' liability and, if personal liable is deemed to exist, to make demands on the company's directors. A liquidator is also obligated to notify certain criminal acts to the prosecutor.

4. Proceedings against directors?

i) Who can bring proceedings against the directors? In England, for example, fraudulent trading and wrongful trading proceedings can only be brought by the liquidator. It may be the case that elsewhere in Europe similar actions could be brought by creditors and contributories as well.

In Sweden, it is primarily the liquidator who brings an action against the company's directors and notifies the prosecutor upon suspicion of any crime. If the liquidator decides not to sue the company's directors for economic compensation, in certain cases the company's creditors have the possibility to bring an action against the directors.

As regards companies that are under an obligation to go into liquidation, i.e. companies whose equity is less than one half of the company's registered share capital, the company's creditors whose claims arise after the date on which the obligation to go into liquidation occurs may also bring an action against the company's directors.

In addition, the company's shareholders may, to a certain extent, bring an action against the company's directors in accordance with the damages rules in the Companies Act as referred to above.

Summary

In Sweden, directors incur liability primarily in connection with the liquidator's investigation and the claims that the estate in liquidation might possibly have against the directors as a consequence of their behaviour prior to the insolvent liquidation. In addition, after his investigation, the liquidator also initiates the issue of criminal liability by notifying a special authority, the Economic Crimes Bureau, which is especially focused on white-collar crimes and crimes associated with business operations. In addition, interested parties,

specifically the company's creditors, have a possibility to act against the company's directors. However, the insolvency procedure is based on the idea behind that the creditors shall act through the liquidator and that the liquidator takes the initiative in the insolvency-related issues.

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