

# European Legal Developments Bulletin

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## SWITZERLAND

### Bankruptcy: privileged claims by managers

#### Legal background

*When a company goes bankrupt, its employees are entitled to a privileged claim for their salaries. For managers, however, there are certain limits to this privilege.*

In Swiss bankruptcy law, claims against a bankrupt company are ranked in three classes. The claims of creditors ranked in the first class must be fully satisfied before any claim in the second class is satisfied, and so on. The first class includes certain employment-related claims arising during the six-month period prior to the start of the bankruptcy. These claims include claims by employees, claims based on facultative pension schemes, claims of pension funds against employers, and claims for maintenance and assistance under family law. Some claims based on social security law or family law are ranked in the second class. The third class encompasses all other claims; these claims enjoy no privilege.

Employees' claims are covered, up to CHF8,900 per month, by the insolvency insurance that is part of public unemployment insurance. To the extent that employees' claims are paid by the insurer, the insurer enjoys the employees' rights, including their privileged ranking.

In practice, third class creditors often receive little, if anything, from bankruptcy proceedings. On the other hand, the claims of first and second class creditors are often partly or fully satisfied. The question of whether a claim against a bankrupt company is ranked in a privileged class is therefore very important.

#### Scope of privilege

The rationale for the privilege is the protection of employees, who are seen as being in a socially weaker position when their employer goes bankrupt. However, the lawmaker's intention is not completely reflected in the law because the salary claims of all employees are preferentially treated, irrespective of the amount in question and of the position of the employee within the bankrupt company. Nevertheless, Swiss courts tend to refuse to grant the privilege to managers who were employed in leading positions within the bankrupt company.

These leading positions tend to include the following characteristics:

- The manager was not only an employee of the bankrupt company, but was also a member of its board;
- The manager had a substantial equity interest in the bankrupt company, enabling him or her to influence the company beyond his or her function as a manager;
- The manager was de facto independent in the exercise of his or her function and was not bound by any instructions.

In its most recent published decision on the topic, the Federal Supreme Court has held (BGE 118 III 46 et seq) that the general manager of a bankrupt company, who was also a member of its board, was not entitled to the privilege. The court reasoned that the general manager, in his capacity as a member of the board, was not bound by any instructions and, consequently, was not subordinated to anyone within the bankrupt company. The court expressly dismissed the argument brought forward in the lower court that the general manager was entitled to the privilege because he had no equity interest in the bankrupt company.

## Remaining uncertainties

Even though there are numerous court decisions on the scope of the privilege, some uncertainties remain. One cause of this uncertainty may be that the Swiss Debt Enforcement and Bankruptcy Law does not limit the privilege with respect to claims by the managers of a bankrupt company. In the absence of an express limitation, the courts have denied the privilege on grounds of equity, on a case-by-case basis. The principle to be drawn from these decisions is that a manager who has a significant equity interest in a bankrupt company or who has been member of its board will normally be denied the privilege. This, of course, is only an emerging principle; there are exceptions. For example, the courts have granted the privilege in the case of a manager who was a member of the board of the bankrupt company for only a very short period of time. On the other hand, the privilege has sometimes been denied in situations where the manager had no equity interest in the bankrupt company. In such cases, the courts have analysed, in detail, the position of the manager within the company and whether he was de facto (and not only de jure) subordinated to the board of directors of the bankrupt company.

## Future developments

Given the publicity that high executive compensation packages have received, a parliamentary initiative to further limit the legal privilege of managers has been launched. This initiative aims to limit the privilege given to salary claims so that the claimant would not receive more than double his or her insured salary under the Swiss Federal Insurance Act (this double amount would total CHF17,800.00 pa). The initiative is still under deliberation in the Swiss parliament and it is not clear at this stage whether it will result in an amendment to the Swiss Debt Enforcement and Bankruptcy Law.

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## UKRAINE

### Tax reform

*New legislation introduced at the end of March this year has made a number of highly significant changes to the national tax regime.*

On 25 March 2005, the Verkhovna Rada (the Ukrainian parliament) approved the Law of Ukraine on the Introduction of Changes into the Law of Ukraine "On the State Budget of Ukraine for 2005" and Certain Other Legislative Acts of Ukraine (the Tax Changes Law). The Tax Changes Law restated the Law of Ukraine on the State Budget of Ukraine for 2005 in its entirety, and introduced changes to nearly 100 other laws, including (but not limited to) laws governing valued added taxation (VAT), personal income tax and corporate profits tax.

### General

The Tax Changes Law became effective on 31 March 2005, when it was officially published. Some of its provisions, however, were enacted retrospectively as of 1 January 2005, whereas several others were intended to come into force on later dates.

The Tax Changes Law has revised upwards the macroeconomic indices by significantly increasing both the government's expected revenues and expenditures. The anticipated deficit in the state budget of nearly 6% of the expected expenditures is planned to be covered by revenues from privatisation to be conducted in 2005.

Under the Tax Changes Law, the minimum monthly salary will be UAH290 as of 1 April 2005; UAH310 as of 1 July 2005; and UAH332 as of 1 September 2005. According to the