

UPDATE CORPORATE LAW 01/2023

Corporate Law Digitalisation Act 2022– GesDigG 2022

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On 6 December 2022, the **Corporate Law Digitalisation Act 2022** (GesDigG 2022) was published (Federal Law Gazette I 186/2022) and entered into force retroactively as of 1 December 2022. The background to the GesDigG 2022 is the implementation of **Directive (EU) 2019/1151 (Digitalisation Directive)**.

The GesDigG 2022 introduced amendments to the Commercial Code (UGB), the Company Register Act (FBG), the Limited Liability Companies Act (GmbHG), the Stock Corporation Act (AktG), the Demerger Act (SpaltG), the Cooperative Societies Act (GenG) and the Court Fees Act (GGG). The following provides concise information on selected modifications by the GesDigG 2022:

- Under the previous Austrian legal regime, only a payment to a domestic credit institution was permissible for the payment of the share capital of a limited liability company. With the GesDigG 2022, section 10 para 2 GmbHG was amended to the effect that the payment can be made **either** to a **domestic credit institution** or to a **CRR credit institution** within the meaning of section 9 Banking Act (BWG). This also covers **all banks from the EEA** that are authorised to conduct banking business in Austria on the basis of the freedom of establishment or the free movement of services. The reference to the Postal Savings Bank, which no longer exists, has been dropped. According to the legislative materials, the written **bank confirmation** required under section 10 para 3 third sentence GmbHG must also have the **legally prescribed wording** in the case of an EEA credit institution; liability for the correctness of the confirmation also applies equally to domestic and foreign credit institutions. Furthermore, according to the legislative materials, the account credit in the case of a cash incorporation must always be denominated in a Euro amount, because the GmbHG consistently refers to this currency.
- The company register courts are now required to decide on the **first-time registration of legal entities** (unless they are founded by means of a reorganisation) and the application for **domestic branch offices** of foreign legal entities **within five working days** (section 20a FBG). In the future, the judges and clerks of the court dealing with company register matters shall, as a rule, make a decision within one calendar week after the receipt of an application for the first-time registration of a legal entity or a branch office. According to the legislative materials, this is already the norm, but a legal obligation is to be welcomed without reservation. If a decision within the period of five working days is in exceptional cases not possible, the court must inform the applicant of the delay, stating the reason.

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- Due to the GesDigG 2022, it was uniformly stipulated for the **protection of creditors** in the case of a capital reduction of a stock corporation, merger, conversion of a stock corporation into a limited liability company and demergers that the relevant periods begin with the registration in the companies register (sections 178 para 1 and 2, 226 1, 243 AktG, 15 para 2 SpaltG).
- According to the legislative materials, the future establishment of the digital platform "**JustizOnline**" is intended to enable easy access to the land and company register, among other things.

Covid-19 & Corporate Law

Even though the COVID-19 pandemic has meanwhile been pushed back in the public perception by other problems, its consequences still have an impact on the legal situation. On 15 December 2022, the Austrian National Council decided to extend the provisions of the COVID-19 Corporate Law Act (COVID-19-GesG). The extension has since been announced and is already effective. Likewise, the COVID-19 Company Law Ordinance (COVID-19-GesV) has been amended accordingly. Whether virtual shareholders' meetings will finally make it into permanent law is still open, but they will at least be possible until 30 June 2023.

Virtual shareholders' meetings

To ensure that companies and associations can still hold virtual shareholders' meetings in the first half of 2023, the validity of section 1 COVID-19-GesG is again extended by **six months until 30 June 2023**. In addition, the possibility provided for in section 2 COVID-19-GesG to hold **meetings** of companies and associations **at a later date** shall remain in force until 30 June 2023.

Preparation and filing of annual financial statements

The preparation and disclosure periods for accounting documents will also be extended again. This applies in particular to **annual financial statements as of 30 June 2022**, for which the possibility of extending the **preparation period to up to nine months** and the extension of the **filing period to twelve months** applies. Following the example of the previous regulation, according to the Act, a loop-in regulation is to apply for the cut-off dates thereafter (disclosure period for cut-off date 31.07.2022 eleven months and for cut-off date 31.08.2022 ten months; preparation period can be extended for the last time to six months for documents with cut-off date 30.09.2022).

Preview: GesMobG under review

On 20 January 2023, the draft of the **Corporate Mobility Act (GesMobG)** was finally sent out for review. The Act serves to implement the European Mobility Directive (Directive (EU) 2019/2121). The previous EU Merger Act (EU-VerschG) is to be replaced by a uniform "Federal Act on Cross-Border Reorganisations of Corporations in the European Union (**EU Reorganisation Act – EU-UmgrG**)", which now contains regulations for the following three cross-border types of reorganisation: **Conversion, merger and demerger**. The end of the review period is 24 February 2023, and it is to be hoped that the new law will then enter into force quickly.

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Supreme Court: Right to delegate or nominate a managing director?

In the underlying facts of this Supreme Court decision (OGH 18.11.2022, 6 Ob 42/22b), the following passage was found in the articles of association: "*For the duration of her participation as a shareholder, she has the **right to appoint a managing director** (special right pursuant to section 50 para 4 GmbHG).*" The core of the dispute in the proceeding was whether the plaintiff shareholder was granted a right to delegate or (merely) to nominate a managing director in the articles of association of the limited liability company.

According to the Supreme Court, in view of the relevant legal literature, it is clear that with regard to **provisions in articles of association** (in deviation from statutory dispositive provisions), the terms **naming (nomination) right** and **right of delegation** are in common use, and that the general term of appointment used in the Act, on the other hand, does not necessarily indicate which "appointment type" was agreed upon. Namely, either a **delegation without further participation** of the other shareholders or **nomination with subsequent appointment resolution to which the other shareholders must consent**, unless there are important reasons to the contrary. According to the Supreme Court, if the contract did not grant a "right to delegate" but a "**right to appoint**" - and also not a "right to appoint a managing director" - it cannot be said that the **wording of the contractual provision was "clear and unambiguous"**. The appellate court's assessment of the present contractual clause as a **mere right of nomination** was not objectionable.

This decision shows, not only with regard to delegation or nomination rights, that it is essential to use **clear language** when drafting articles of association. If a provision leaves room for interpretation, this can have unpleasant consequences, as it did for the plaintiff in these proceedings.

Supreme Court on the minimum period for exercising subscription rights in limited liability company law

In the absence of any other stipulation in the articles of association or the increase resolution, the existing shareholders of a limited liability company are entitled to a pre-emptive right to subscribe to the new share capital pro rata within four weeks from the day the resolution is passed, pursuant to § 52 para 3 GmbHG. While the **four-week period** for exercising the pre-emptive right is dispositive for limited liability companies according to the wording of the law, stock corporation law provides for a **mandatory minimum period of two weeks** (section 153 para 1 AktG).

In this decision (OGH 17.10.2022, 6 Ob 183/22p), the Supreme Court has now followed the opinion in legal literature, according to which the **two-week period** pursuant to section 153 para 1 sentence 2 AktG **is to be applied analogously in limited liability company law** due to the lack of special peculiarities under stock corporation law. An exception for GmbHs with a personalistic structure was also explicitly rejected.

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Supreme Court: Trustors in a GmbH share do not have voting rights

This decision (OGH 14. 7. 2022, 5 Ob 98/22f) was based on a case in which the power of attorney for an appeal in the name of the appellant (limited liability company) was granted by a person who derived his alleged management authority from a circular resolution. However, the **persons designated as shareholders in this circular resolution**, who also passed the circular resolution, were **never entered in the companies register as shareholders**. It was argued that they were the trustors of the shares in the limited liability company.

The legal assessment of the Supreme Court can be summarised as follows: If a share is held in trust, the **trustee**, not the trustor, is **entitled to vote**. A trustor does not have a partial legal position within the company derived from his/her position similar to that of a shareholder; **only the trustee is a shareholder**. The trustee alone is the bearer of the corporate rights and obligations. Even in the case of an **open trusteeship**, there is **no legal relationship** between the trustor and the company. Pursuant to section 78 para 1 GmbHG, in relation to the company only the person who appears as such in the companies register is deemed to be a shareholder. **Only shareholders who are registered in the companies register are permitted to vote**. If a resolution is passed by or with the participation of non-shareholders, it is a **sham resolution** that has no legal effect. The **circular resolution** was therefore passed by persons who are not shareholders and therefore has **no effect**.

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